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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 75-1892

UNITED STATES OF AMERICA,
Petitioner,

v.

JEFFREY R. MACDONALD,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

Brief for Respondent Jeffrey R. MacDonald

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COUNTER-STATEMENT

A. The crime and pre-accusation investigation.

In February 1970, Jeffrey R. MacDonald was a medical doctor on a two-year term of military duty with the Army Sixth Special Forces Group at Fort Bragg, North Carolina. He lived with his wife Colette and his two daughters, Kimberly, 6, and Kristen, 3, in a home on the Army base.

In the early morning hours of February 17, 1970, Mrs. MacDonald and the two children were murdered, and Dr. MacDonald suffered a variety of injuries including a near-fatal

stab wound in his right lung. According to the Army's Article 32 investigation the murders and assault were committed by a group of intruders armed with several knives, an ice pick and wooden clubs.[1]

When military police and medical personnel arrived at the house, Dr. MacDonald was found unconscious, but later was able to supply information concerning the attackers, including a woman member of the group. The description of her matched that of a woman seen on a deserted, rain-soaked street corner at 4.00 a.m. near the MacDonald home by a military policeman who was responding to Dr. MacDonald's telephone call for help. The military police inexplicably failed to set up roadblocks at the exits of Fort Bragg until three hours after the crimes had been discovered, and the woman was not apprehended.[2]

Despite information supplied by Dr. MacDonald, the military police and other evidence, an investigator from the Army's Criminal Investigation Division (CID) concluded shortly after the crimes that Dr. MacDonald was the principal suspect in the murders of his family.[3] The investigator's opinion was based on the belief that the crime scene had been "staged," and because he, personally, was unable to find any physical evidence that there had been intruders in the MacDonald home.

Sworn testimony by various military policemen, who had arrived at the MacDonald house before the CID, established that there was a total failure to protect the crime scene from disturbance. For example, a man in civilian clothing was allowed to walk through the scene and sit on the sofa where Dr. MacDonald

1. The government relies extensively on the Article 32 record but does not report the conclusions of the presiding officer, Colonel Rock.

2. Article 32 testimony of J. L. Paulk and W. A. Boulware, E-42; E-3, at 15-109, 1612-1624. The page numbers are those of the verbatim Article 32 transcript. The references to "E" are to Exhibit numbers to Colonel Rock's report. *See* Government brief, at 4 n. 1.

3. Ivory Grand Jury testimony, at 110.

had been stabbed and wounded. The unidentified person apparently picked up the flower pot that had been lying on its side, and stood it upright.[4] CID investigators later concluded that the fact that the flower pot was *not* lying on its side was evidence that the crime scene had been staged.[5]

More than a dozen MP's and army hospital personnel tramped through all parts of the house. A wheeled stretcher was rolled through the entire length of the crime scene. Yet the CID investigator who concluded that there was no evidence of intruders in the house also found no signs of the disorganized presence of the Army personnel who had been on the scene before he arrived.

The shocking nature of the crimes and the immediate wave of notoriety caused the Army to assign the investigation the highest priority. A team of CID agents and military police investigators was detailed to work full time on the case. A group of technicians was flown in from the CID crime laboratory at Fort Gordon, Georgia. The technicians and CID agents processed the crime scene for five continuous days. Entire sections of walls and floors of the MacDonald home were dismantled and taken to the CID laboratory.[6] The house was sealed by the Army and to this day remains closed as part of the evidence in this case.

However, the investigation by the CID was also characterized by the irretrievable destruction of evidence. A group of forty-four fingerprints was located at a place in the house critical to the investigation. The fingerprints were dusted, photographed and then "lifted." However, in the lifting process, the prints were

4. Article 32 testimony of K. C. Mica, E-34, at 150-153.

5. The CID did not bother to ask the Military Police who were the first at the house whether the crime scene had been disturbed. And, the CID did not learn until the testimonial phase of the Article 32 proceedings that the flower pot had been moved *after* the MP's arrived at the house. Article 32 testimony of K. C. Mica, E-34, at 150-153.

6. The systematic and extensive laboratory work that was done is described in detail in the Government's brief before the Court of Appeals for the Fourth Circuit, at 43-44.

destroyed. And, the photographs of the fingerprints had been improperly taken and were unidentifiable.[7]

Although the CID was joined in the investigation by the Federal Bureau of Investigation, the Army was ultimately given the responsibility of carrying out the investigation of the crimes.

The CID laboratory conducted tests of several hundred items of physical evidence during a month and a half period. When the final reports of the laboratory were submitted to the CID investigators, they viewed them as confirmation of their original suspicions about Dr. MacDonald.

With the laboratory findings on the physical evidence in hand, and with results of seven weeks of extensive investigation, the CID called in Dr. MacDonald for interrogation. He was given the military equivalent of *Miranda* warnings and told that he was the suspect in the murders of his family. Following that interrogation, he was ordered restricted to his quarters by his commanding officer.

B. The commencement of military justice proceedings.

Although the government had a choice of forums in which to prosecute Dr. MacDonald, either in the district court or before a military court, it elected to proceed with the criminal case against him under the military justice system.

On May 1, 1970, Dr. MacDonald was formally charged and arrested for the murders of his family.[8]

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7. Ivory Grand Jury testimony, at 97-99. Article 32 testimony of H. O. Medlin, E-33, at 497.

8. Because he was an officer, rather than being placed in a stockade, he was confined to his quarters under 24-hour armed guard. Access to him could only be had by persons approved by his commanding officer. He was only able to leave confinement for exercise, meals and for legal matters, and at all those times he was in the custody of another officer.

The government concedes that under the circumstances of this case, this was confinement for purposes of analysis of the Sixth Amendment right to a speedy trial. Pet., at 18.

Immediately thereafter the military justice process was officially begun against Dr. MacDonald by the forwarding of charges.[9] The charges were publicly announced—in this case by a press release from the Army and a press conference by the Provost Marshall of Fort Bragg.

On May 12, 1970 an order was issued directing the commencement of full Article 32 proceedings against Dr. MacDonald. (A. 131) These began promptly on May 15, 1970. (A. 132) The presiding officer was Colonel Warren V. Rock, an infantry officer with thirty years of service and substantial courts-martial experience. He had the full-time assistance of a qualified military judge, Captain Hammond A. Beale, Jr., as his legal adviser.

The government was represented by two prosecutors who were fully qualified under military regulations. Dr. MacDonald was present throughout the proceedings and was represented by counsel.

Proceedings under Article 32 are significant, the government's contention to the contrary notwithstanding. It bears little resemblance to the preliminary hearing in federal civilian courts. The determination in the latter is whether there is a prima facie case against the accused. In an Article 32 proceeding, the determination to be made is "the truth of the matter set forth in the charges . . ." 10 U.S.C. § 832.[10]

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9. To the extent that analogies may be drawn between the military and civilian systems of justice, the forwarding of charges is the equivalent of the return of an indictment. This action is taken only after a preliminary investigation has been completed. Manual for Courts-Martial ¶ 32b (U.S. rev.ed. 1969). At this point the statute of limitations ceases to run. Manual for Courts-Martial ¶ 33b (U.S. rev.ed. 1969); Articles 43(b), (c) of the Uniform Code of Military Justice, 10 U.S.C. §§ 843(b), (c). It is significant that the general federal statute of limitations, 18 U.S.C. § 3282, ceases to run at the time "the indictment is found or the information is instituted." Thus, the filing of sworn charges within the military system is by virtue of the Manual of Courts-Martial and the Uniform Code of Military Justice exactly analogous to the return of an indictment under 18 U.S.C. § 3282.

10. For a full discussion of the role of the Article 32 hearing in the military justice system, see MacDonald brief, 4th Cir., at 20-29.

The Article 32 proceedings were convened on May 15, 1970. At that time, the presiding officer asked counsel for the government when he would be ready to proceed with the presentation of evidence. The prosecutor stated he would be ready in two weeks. (A. 117) The matter was then recessed.[11]

At the outset of the testimonial phase of the proceedings on July 6, 1970, Colonel Rock stated that because of the extraordinary seriousness of the case and the attention it had received, the government would be required to present all the relevant evidence known to it supporting the charges against Dr. MacDonald.[12] The prosecutors acknowledged the directive of Colonel Rock and announced that they were ready and able to proceed.[13]

Under military regulations, Colonel Rock had the right to obtain and examine, in advance of the testimonial phase, the complete investigation files prepared by the CID. However, he declined to do so in favor of requiring the prosecution attorneys to present all of the evidence in open court. This decision may have been partially motivated by the fact that the prosecutors had refused to comply with the bulk of the defendant's demands for discovery. (A. 132)

The prosecutors knew that if they were to carry their burden of showing that the charges were "true," they could not rely upon or assume any knowledge by Colonel Rock of the facts obtained by the CID investigation. They knew that they had to put on a complete case at the Article 32 proceedings. There is no basis to believe the military prosecutors withheld evidence from Colonel Rock.

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11. A further continuance was granted until July 6, 1970, when the taking of testimony began.

12. Article 32 transcript, at 1.

13. *Id.*

C. The Article 32 proceedings and the evidence adduced therein.

The theory of the crimes, argued by the government at the Article 32 proceedings, was that Dr. MacDonald had become insanely incensed at his wife in an argument over whether their 3-year-old daughter should still be given a bottle at bedtime since she was bed wetting. (A. 141) The government argued that Mrs. MacDonald stabbed her husband, that he in turn lost ". . . all control in a blind fantastic mindless rage. . . .," clubbed her to death and then clubbed the youngest child to death. (*Id.*) Then, the government contended, Dr. MacDonald "regained his senses" and killed his other daughter as part of a scheme to falsely blame all the killings on intruders. (*Id.*)[14]

However, the government produced no evidence that Dr. MacDonald was anything other than a well-balanced and stable person. The evidence also showed that neither Dr. MacDonald nor his wife were under the influence of alcohol or drugs on the night of the murders. (A. 139)

Examination of the case as actually developed by the government showed that it was "wholly circumstantial and rested on a detailed, hypothetical reconstruction of the crime." (*United States v. MacDonald*, 531 F.2d 196, 199 (4th Cir. 1976); *see also* A. 141-145)

The government called twenty-seven witnesses. It placed in evidence the results of intensive CID laboratory examinations of

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14. The government's theory not only was unsupported by any evidence, it was even at odds with its own evidence. An example of this was the government's argument that it was Mrs. MacDonald who had stabbed Dr. MacDonald. However, the prosecution called three doctors in an effort to prove that the stab wound to his lung was self-inflicted by Dr. MacDonald. Two of the three government witnesses rejected the suggestion as not credible and described the injury as life-threatening. The third doctor called by the government testified that the injury was not life-threatening. However, it was developed that he had never examined Dr. MacDonald and that he had been grossly misled as to the location of the stab wound. E-15, at 1498-1507.

hundreds of items of physical evidence.[15] Some of the physical evidence was also examined by other experts retained by the government.[16]

The evidence presented by the prosecution at the Article 32 proceedings had been gathered over an eight month period and was the result of the efforts of more than one hundred military and civilian law enforcement investigators. These investigators had assembled material from approximately 1,500 witnesses, including a number who were in foreign countries. (MacDonald Appendix, 4th Cir., at A. 673)

At no time was there even a suggestion by the prosecutors or the CID investigators that the investigation was either incomplete or preliminary in any way.

Dr. MacDonald presented a full defense to the charges against him. He testified at length under oath and was subjected to an extensive cross-examination by counsel for the government. He was also questioned in detail by the presiding officer. His testimony was the same as the information he had given the military police, the CID investigators and the FBI.[17]

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15. Before this Court the government has attempted to explain the delays in this case by referring to the work of the CID laboratory as some sort of "preliminary laboratory analysis of the physical evidence." Government brief, at 7. There is nothing in the record, and nothing in fact, to support such a statement.

In neither the testimony of the various CID laboratory technicians at the Article 32 proceedings, nor in the dozens of pages of laboratory reports which were made part of that record, was there any suggestion that the work was other than comprehensive, complete and final. At no time did counsel for the government at the Article 32 proceedings ever indicate that the laboratory work was preliminary, or incomplete, or that the government needed further laboratory work in order to make out its proof.

16. All of this physical evidence was the same evidence examined by the FBI laboratory in 1974. No new physical evidence has ever been uncovered since the original investigation of this crime in 1970.

17. The government now concedes the consistency of Dr. MacDonald's statements. "[H]e has presented essentially the same version of those events from his initial interview on the morning following the murders

In addition to Dr. MacDonald, the defense called twenty-nine other witnesses.[18]

Among them was a well-qualified forensic psychiatrist. Because of the government's theory that Dr. MacDonald had slaughtered his family with a multiplicity of weapons in an insane rage over bed-wetting, this witness was asked to testify concerning the findings of his comprehensive psychiatric and psychological evaluations of Dr. MacDonald.

His conclusion was that if Dr. MacDonald had committed the murders in the particularly gruesome and vicious fashion that they took place, there would be some evidence of psychiatric problem, emotional disability or of a psychotic episode. He concluded that there was no evidence of such conditions. To the contrary, he found that Dr. MacDonald was a sane, well-balanced adult, with adequate and healthy outlets for his feelings. (A. 176-177) Finally, he concluded that Dr. MacDonald was not attempting to hide the facts concerning the murders. (A. 138)

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to his appearances before the grand jury in 1974 and 1975." Government brief, at 64. In oral argument in the court below, however, the government sought to justify its delay and to impute guilt to Dr. MacDonald by ascribing inconsistencies to him.

18. Some of these witnesses have been inaccurately described as character witnesses. Government brief, at 10. Because the government's theory was that MacDonald had destroyed his family in a rage over bed-wetting, a substantial number of witnesses who had known Dr. MacDonald, his wife and children at every stage of their lives were called to determine if there was any basis in fact for this theory. These witnesses testified to the relationship between the MacDonalds, and of Dr. MacDonald with his children. They covered every period of the MacDonalds' life from their days as high-school sweethearts, through undergraduate studies at Princeton, through medical school at Northwestern, through internship at Columbia Presbyterian Hospital in New York, and finally in the Army. These witnesses were rebuttal witnesses to the theory asserted vigorously by the prosecutors in their opening and closing addresses to the presiding officer. It is still the theory of the government's case today. Not one scintilla of evidence supported the suggestion that Dr. MacDonald was either emotionally unstable or given to violence of any sort toward his wife or children. A. 140, 181-183.

The defense also developed evidence that supported the conclusion that there had been intruders in the home. It was shown that there were a substantial number of fingerprints in crucial locations in the house that were not identified as belonging to the family. There was also testimony that several valuable items were missing from the house.

Most significantly, evidence introduced at the Article 32 proceedings showed that the activities of a woman, Helena Stokely, during the early morning hours when the murders occurred were highly suspicious and unusual. When wearing her blonde wig and floppy hat, she generally fit the description of the woman seen by Dr. MacDonald in his home during the murders. Miss Stokely did not deny her presence at the crime scene; she claimed she could not remember where she was because she was "stoned on mescaline." (A. 178-179) This testimony was so extraordinary that Colonel Rock specifically recommended that her involvement in the murders be investigated further. (A. 136)

D. The independent investigation made by the Article 32 presiding officer.

After the government and defense both presented extensive evidence at the Article 32 proceedings, the presiding officer utilized his own unique authority under the Uniform Code of Military Justice to make additional independent investigation of the facts and circumstances surrounding the murders.[19]

Among other things, he conducted his own investigation of the physical facts and made relevant experiments (A. 199-201); he obtained a psychiatric examination of Dr. MacDonald by doctors of his choice (A. 194); he called and examined his own witnesses (A. 193); and, he independently questioned the witnesses called by both parties.

19. In most ways, his powers are more analogous to those of the inquiring magistrate in Continental legal systems than to the committing magistrate of the American criminal justice system.

1. Psychiatric evaluation.

Of particular significance was the role of the presiding officer in obtaining his own psychiatric examination of Dr. MacDonald following the testimony of the defense psychiatrist. First, Colonel Rock obtained the defense psychological examinations. These were submitted to a team of three Army psychiatrists at Walter Reed Army Hospital, who were directed to examine Dr. MacDonald. He then ordered the prosecutors to fully brief the military psychiatrists on the facts of the crime and the investigation.

While the government did not have the authority to compel the defendant to submit to such an examination or disclose these materials, Colonel Rock made clear to the defense that he would substantially discount the defendant's own expert witnesses unless Dr. MacDonald fully cooperated with the psychiatric evaluation by Army doctors which he had arranged.

The Article 32 proceedings were adjourned to permit four days of examination of Dr. MacDonald in Washington, D.C., conducted under the direction of the chief of psychiatric services at Walter Reed. That doctor was then called as the presiding officer's witness when the proceedings were resumed.

In the words of Colonel Rock's final report, ". . . there is a striking similarity in the conclusions" of the defense psychiatrist and psychiatrists at Walter Reed Army Hospital. Those conclusions were that:

- Dr. MacDonald is a sane, well-balanced adult;
- that he was not hiding any of the facts concerning the night of the murders and the assault on himself;
- that he was sane on February 17, 1970 and sane at the time of the psychiatric examinations.

2. Presiding officer's own physical observations.

One key element of the government's case was the contention that the crime scene in the living room of the house had been staged. The CID investigators alleged that they had conducted

experiments with a coffee table and had concluded that if it had been knocked over during the course of a struggle, it would have landed upside down, rather than on its side as found on the morning of February 17, 1970. (A. 165)

During an adjournment in the testimonial phase of the Article 32 proceedings, Colonel Rock, accompanied by his legal adviser, conducted his own experiment with the coffee table in the MacDonald house. When struck by Colonel Rock, the table came to rest on its side, just as it had originally been found by CID investigators. (A. 200)

The presiding officer called a total of six witnesses of his own. He also questioned, independently of counsel, nearly every one of the fifty-seven witnesses who testified at the Article 32 proceedings.

E. The results of the Article 32 proceedings.

The Article 32 proceedings lasted five months. All the evidence the prosecutors had to support the accusations against Dr. MacDonald was produced. The hearings required more than four full weeks of in-court testimony.[20] The results were:

- a record of nearly 2,000 legal-sized pages;
- a 90-page summary of the evidence and conclusions;
- two findings.[21]

The first finding was that all charges against Dr. MacDonald "are not true." (A. 136)

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20. In accordance with military custom, the proceedings were convened at 8:30 a.m. and lasted until 4:00 or 4:30 p.m. daily, with a short recess for lunch. The average day involved six to six and one-half hours of testimony.

21. Since Colonel Rock's findings were subject to further review, the procedures followed by Colonel Rock in submitting detailed summaries of the evidence, his conclusions and findings were in accord with the high standards required of district judges under Fed. R. Civ. P. 52.

The second finding was that "appropriate civilian authorities be requested to investigate the alibi of Helena Stokely . . . [in regard to] . . . her whereabouts during the early morning hours of 17 February 1970 . . ." (*Id.*)

The report was filed by Colonel Rock with Major General Edward M. Flanagan, Jr., on October 13, 1970. The procedure followed subsequent to the filing is outlined in both the Manual for Courts-Martial (U.S. rev.ed. 1969) and the Uniform Code of Military Justice. The report was referred to the Staff Judge Advocate of the Fort Bragg commanding general. The Staff Judge Advocate had the authority to ask the prosecutors or the CID to comment or note objections to the report. This was part of the Staff Judge Advocate's function of advising the commanding general on proper disposition of the case. No such objections were made.

Before concurring in, or disapproving of, the findings and conclusions of Colonel Rock, the commanding general was required under the Uniform Code of Military Justice to make a full, independent judicial review of the matter. He had the authority to reject the findings of Colonel Rock if they were not supported by the record. He also had broad discretion to reject the results of the Article 32 proceedings if he found them unacceptable for any reason.

If the commanding general and his legal adviser had concluded that the findings were based upon an incomplete investigation or incomplete presentation of evidence by the prosecutors, he could have remanded the matter to Colonel Rock for further proceedings to deal with the unanswered issues. He also could have ordered a totally new investigation if he had concluded that the government's investigation was incomplete.[22]

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22. The commanding general had the power at any time to suspend the Article 32 proceedings or to order them reopened for further investigation. He could have done this on his own motion or at the request of the prosecutors. Military Justice Handbook, Dept. of Army Pamphlet 27-8, at 49 (1957).

Yet, on October 23, 1970, the commanding general formally entered an order dismissing the charges against Dr. MacDonald. On October 28, 1970, Dr. MacDonald was released from confinement.

F. Release of Dr. MacDonald from the Army.

Dr. MacDonald's two-year term of service in the Army was to end in June 1971. However, following the dismissal of the charges against him, he applied for a hardship discharge. The government not only could have refused to grant him an early discharge, but it had the power to retain him in the military service beyond his normal discharge date for the purpose of investigating criminal charges against him.[23]

The sequence of events established that the Army had sufficient confidence in the Article 32 proceedings and in the independent review of the entire matter by the commanding general and his legal advisers to grant Dr. MacDonald's request. On December 6, 1970, he was honorably discharged from the Army.

G. The CID's reinvestigation.

The dismissal of the charges against Dr. MacDonald, however, did not end the CID's investigation of the crime or of Dr. MacDonald. Promptly after Dr. MacDonald's release from service, the CID, in January 1971, undertook a reinvestigation of both the crimes and its own investigatory processes. And, as we shall see, it promptly focused on Dr. MacDonald as if the entire Article 32 proceedings were merely a prologue.

As the foundation for this reinvestigation, the CID agents had large amounts of data already at their disposal. There was

23. *See* Army Regulation AR 600-31. The procedure of holding an officer in the service beyond the expiration date of his term of service for criminal investigation was utilized in the case of Lt. William Calley, who was extended on active duty while the Army was determining whether charges were to be brought against him.

a complete CID investigative file assembled from February 17, 1970 through the end of the Article 32 proceedings. Voluminous CID crime laboratory reports were available, as were reports of FBI and local law enforcement agency investigations. Of course, there also existed nearly 2,000 pages of Article 32 transcript, which included defense evidence. The reinvestigation did not need to begin, nor did it, with a tabula rasa.

The CID reinvestigation also began with the benefit of the legal insights and experiences of the Army prosecutors and Staff Judge Advocate personnel who had participated in and reviewed the Article 32 proceedings. In addition, the CID had the benefit of its own staff judge advocate, who is a military lawyer specifically assigned to give legal guidance to CID personnel in the conduct of CID business. Finally, the record shows that the full experience of the Department of Justice and the FBI laboratory was available and utilized by the CID in conducting the reinvestigation.[24]

During the course of the reinvestigation, the Justice Department requested that the CID submit various items of clothing worn by Colette, Kristen, Kimberly and Jeffrey MacDonald to the FBI laboratory for further analysis. Other items were submitted to the Treasury Department. And, large numbers of other

24. There has been considerable inconsistency in what the government has represented to various courts regarding Department of Justice and FBI laboratory participation in this case. On the one hand, the government represented to the Fourth Circuit that the FBI laboratory was involved as early as 1971. Government brief, 4th Cir., at 60-61. On the other hand, the Assistant United States Attorney represented to the magistrate at respondent's bail reduction hearing that the FBI laboratory had become involved only in 1974, because somehow or other, "government bureaucracy" kept the FBI laboratory from working on the case until the convening of the grand jury. *See* A. 111. *See also United States v. MacDonald, supra,* 531 F.2d at 201. In its Petition for Certiorari to this Court, the government now claims an early and strong guidance by the Justice Department over the CID reinvestigation. *See* Pet., at 9-10. It is of course a matter of public knowledge that the FBI is part of the Department of Justice.

items of evidence were resubmitted to the now-maligned ("they do not have the sophistication that the FBI Lab has," A. 111) CID laboratory. Most of this lab work was completed by mid-1971.[25]

The CID reinvestigation, presumably with the concurrence and advice of the Department of Justice and the various government attorneys who had been involved in this case, very early in 1971 again narrowed its focus to Dr. MacDonald. On February 19, 1971, Dr. MacDonald, at the CID's request, submitted to further questioning by CID agents, who first warned him that he was a suspect in the murders of his family.[26] He was questioned for several hours. The CID requested a second opportunity to question Dr. MacDonald and he again submitted to an interrogation on March 20, 1971.

In addition to reinterviewing Dr. MacDonald, all persons involved in the original CID investigation were reinterviewed. There were also a large number of new interviews. In all, the government has represented to this Court that 699 interviews or reinterviews in 30 states and several foreign countries were con-

25. The FBI lab report regarding the victims' clothing bears a date of July 2, 1971. There simply can be no doubt that all the government's physical evidence submitted to the grand jury in 1974-75 was available for laboratory analysis in 1970-71, and that government laboratories were available to analyze that evidence from 1970 onward.

26. From the early morning hours of February 17, 1970 through the return of the indictment against him on January 24, 1975, Dr. MacDonald has been questioned and interrogated by government agents at least eight times (including extensive cross-examination and psychiatric evaluation by government psychiatrists). He has never refused to answer the questions of government investigators, and he has never exercised his Fifth Amendment right against self-incrimination. In addition, the government is aware of interviews Dr. MacDonald has given to the press—indeed, he was questioned before the grand jury about those interviews. The government concedes that Dr. MacDonald has "presented essentially the same version of [the crimes] from his initial interview on the morning following the murders to his appearances before the grand jury in 1974 and 1975." Government brief, at 64.

ducted by the end of 1971. (Government brief, at 11) The reinvestigation started January 21, 1971 and was completed December 6, 1971.

Although the government suggests in its brief that no government agent could (or would) make up his mind what should be done with the case,[27] there is no suggestion that any further "new" evidence was collected past December 1971, or that Dr. MacDonald ever was dropped as the CID's prime suspect. Indeed, every piece of *physical* evidence that was considered by the CID reinvestigation had been in existence at the time of the Article 32 proceedings in 1970. So the government had over a year—until December 1971—in which to reevaluate that physical evidence.[28]

Thus, December 6, 1971[29] for practical purposes marks the end

27. The government has never made the CID reinvestigation report available to the respondent, and that report is not part of any record in this case. The government apparently has chosen selectively to "disclose" what it feels is beneficial, while keeping in its breast the entire contents of that report. *See* Government brief, at 11 n. 8.

28. At various times, the government has attempted to disguise this fact by reference to "new" laboratory analysis of existing evidence. *See, e.g.,* Government brief, at 11-12. But what must be borne in mind is that the evidence has always been there since 1970, and the government has always known that this evidence is the key to its case against respondent. *See* A. 110-111. Before various courts, including the magistrate at Dr. MacDonald's bail reduction hearing, and before the Fourth Circuit, the government has sought to show that it was a lack of adequate laboratory analysis that is to blame for the delay in this case. But the fact remains, the CID laboratory has been involved here since 1970, and the FBI laboratory has been involved at least since mid-1971, when the Department of Justice directed that the CID submit certain physical evidence to the FBI. The "supplemental" reports referred to in the government's brief in the Fourth Circuit and here are reports of tests and reinterpretations of evidence which has never changed since 1970, and which was presented to the Article 32 investigation. The representation by the Assistant United States Attorney in 1975 and the innuendo of the government's brief to this Court at 13 that only the convening of the grand jury somehow could cut through "government bureaucracy" and get the FBI laboratory involved, is belied by the fact that the FBI laboratory was involved at least since 1971.

29. Government brief, 4th Cir., at 59.

of all the evidence-gathering that has ever been done in this case. June 1972 marks the end of whatever "analysis" was done of this evidence. Beyond that point, nothing happened that could not have reasonably been done, even at a leisurely pace, before. By June 1972, there was within the grasp of Justice Department lawyers the material with which to make a decision: investigative files of the CID; an Article 32 transcript and report; various CID, FBI and Treasury laboratory reports; and a "massive" CID reinvestigation report.

H. Dr. MacDonald under continuing public accusation.

Within two months after his discharge from the Army, Dr. MacDonald was made acutely aware that he was still actively being investigated for the murders of his family when he was interrogated by CID agents conducting the reinvestigation of the case.

Not only did he know he was under the cloud of continuing accusation, but newspaper readers in New York (where Dr. MacDonald was then residing), in North Carolina and elsewhere were also aware that the government's accusation against him was still pending. Newspaper stories describing the ongoing investigation and likely early reprosecution of him appeared frequently from 1971 to the date of the indictment.[30]

In an effort to bring to an end the effects of the ongoing accusation against him, Dr. MacDonald made attempts to have the case resolved. (*United States v. MacDonald, supra,* 531 F.2d at 207) His first effort to have the government expedite a decision as to him was in January 1972. (A. 28, 44) His attorneys made unsuccessful continuing efforts to obtain meetings with Justice Department attorneys in order to obtain a resolution of the case. (A. 59-

30. *See* references thereto at A. 89-90, 105. *See also, e.g., Raleigh* [N.C.] *News and Observer,* January 31, 1973, p. 1 and February 1, 1973; *New York Daily News,* March 16, 1973, p. 3.

60) They wrote the Department a series of letters between 1972 and 1974, inquiring about a final decision on the prosecution in order to relieve "the unfounded suspicion" to which Dr. MacDonald was being subjected. (*United States v. MacDonald, supra,* 531 F.2d at 201 nn. 5 & 6; *see* A. 89-109 for the complete text of these letters.)

Beginning in January 1972 and continuing through January 1974, Dr. MacDonald repeatedly offered to submit to interviews by the government attorneys in charge of the case in order to bring to a conclusion the pending accusation against him. (*United States v. MacDonald, supra,* 531 F.2d at 201)

The government's attorneys declined to question him. They also would not advise him when their investigation would be completed. The correspondence with the Department came to an end in January 1974, "leaving MacDonald in suspense." (*Id.* (footnote omitted))

In August 1974, Dr. MacDonald was the first witness subpoenaed to appear in the grand jury proceedings relating to the murders. He waived his right to remain silent and testified on two occasions for a total of more than five days.

I. The Department of Justice delays from June 1972.

By June 1972, the Department of Justice had in its possession the massive 13-volume report of the CID reinvestigation. The government has put forth three different explanations for the thirty-month delay that followed until the indictment was returned.

The primary explanation of the government has been that the delay was necessary in order to have more laboratory work done on the physical evidence; that the CID laboratory was not sophisticated enough to do this work but that the FBI laboratory was;[31] and, that it was not until the grand jury investigation that the

31. Implicit in the government's arguments to this Court is the suggestion that the work product of the CID laboratory was not considered

FBI laboratory had come into the case. (*United States v. MacDonald, supra,* 531 F.2d at 206 n. 18; *see also* A. 110-111)

The record discloses, however, that the FBI laboratory was available to perform examinations on the physical evidence from the day the investigation of the crimes began in February 1970, onward. During the CID reinvestigation in 1971, done at the direction of the Department of Justice, the FBI laboratory conducted numerous examinations of the physical evidence at the request of the Department. (Government brief, 4th Cir., at 60) Only one explanation was offered in the record why the FBI laboratory did not conduct further examination of the evidence from December 1971 until the grand jury proceedings in 1974, and that was "because of government bureaucracy." (*United States v. MacDonald, supra,* 531 F.2d at 206 n. 18 and accompanying text; *see also* A. 111)

A second explanation put forth by the government for the delays in the Department of Justice was the need for its attorneys to become familiar with the case, as it passed the MacDonald file from one attorney to another. The Deputy Assistant Attorney General of the Criminal Division described the process: "The case was assigned and reassigned to various staff attorneys, of the General Crime Section, who repeatedly reviewed and rereviewed the matter." (A. 87; *United States v. MacDonald, supra,* 531 F.2d at 206) There is no indication that the reviewing and rereviewing by the attorneys added substantively to the case file.

However, United States Attorney McNamara, who had been unfamiliar with the case until his appointment late in the fall of

the type of "final" work that would have been used at a trial in the case of the seriousness of the MacDonald murders. Such a suggestion is without any basis in the record of this case, or in fact. It presents the rather novel situation of the Department of Justice itself casting doubt on the validity of the work done by this important facility. Since the CID laboratory is the principal scientific investigative agency for the Army, and since its work has been offered to support convictions in innumerable serious courts-martial proceedings throughout the world, the government's suggestion in this case can only be considered disingenuous.

1972, became sufficiently familiar with the case (including making personal visits to the scene of the crime) to submit by March 14, 1973 a fifty-four page memorandum to the Department recommending prosecution of Dr. MacDonald. (Government brief, 4th Cir., at 62; *United States v. MacDonald, supra,* 531 F.2d at 206)

McNamara also requested the Department to assign a full-time, experienced trial lawyer to assist his office. (Government brief, 4th Cir., at 62) Instead, the Department assigned another attorney "to evaluate the case, and Mr. McNamara's recommendation." (Government brief, 4th Cir., at 62-63)

In May 1974, the Department reassigned the case again, this time to attorney Victor C. Woerheide. In approximately one month, he was able to read the entire CID file, visit the crime scene, examine the physical evidence, and consult with the United States Attorney and the Chief Judge of the District Court in regard to the case. In August 1974, he commenced presenting evidence to the grand jury. (Government brief, 4th Cir., at 63-64)

The third government explanation, and the one now put forward to this Court, is that it required until late May 1974 for the Department to conclude that there were many unanswered questions in the case and the use of "the broad investigative powers of the grand jury" was the only means by which they could be resolved. (Government brief, at 12)

There are no facts in the record which explain why it required a twenty-six month delay from the filing of the CID reinvestigation report until the convening of the grand jury, except that the file was passed from one Justice Department attorney to another. Moreover, there is reason to believe that fourteen months earlier the Department of Justice had reviewed and rereviewed the case sufficiently to make a conclusion as to the need for a grand jury. A New York newspaper reported that "Highly placed sources in the Justice Department said new evidence has been uncovered in the case and that a decision on whether to submit the matter to a federal grand jury would be made within two to five weeks." *New*

York Daily News, March 16, 1973, p. 3 under byline of William Sherman.

The government has described the grand jury investigation as leading to "a number of significant discoveries." (Government brief, at 12) The two discoveries described, however, deal only with physical evidence that had been in its possession since 1970. One "discovery" was an experiment with the holes in Dr. MacDonald's pajama top;[32] the other was a naked-eye examination of a bed sheet which led to an opinion that there was a clothing impression on it. There is nothing in the record to indicate why a grand jury investigation was needed to obtain these opinions from FBI laboratory personnel.

The grand jury was not convened to seek further testimony from Dr. MacDonald. There is no basis to believe that the government was seriously interested in his statements after the CID reinterviews of 1971. The Department had rejected his repeated offers, over a two and a half year period, to submit to full questioning by its attorneys. (*United States v. MacDonald, supra,* 531 F.2d at 201 nn. 5 & 6 and accompanying text; *see also* A. 89-109)

An examination of the list of witnesses actually called before the grand jury reveals that it was essentially a replay of the testimony of the Article 32 proceedings. (Government brief, 4th Cir., at 65-66) The government called all twenty-seven of the witnesses that had testified for it in the military proceeding. It also called various additional Army personnel who were known and had been interviewed by the CID in 1970, but whose testimony was determined by the prosecutors not to be necessary. The significant omissions from among the Article 32 witnesses were most of the defense witnesses, including those who had testified to the nature of the relationship between the MacDonalds.

That the grand jury was not in truth an "investigative" one is demonstrated by the fact that it did not call Helena Stokely,

32. The FBI laboratory had examined the pajama top as early as June, 1971.

whose activities Colonel Rock specifically recommended be investigated. The grand jury's "broad investigative powers" were notably unused in this case to do anything but retrack old evidence.

The grand jury was convened and heard its first witness, Dr. MacDonald, on August 12, 1974. Within a month, the MacDonald investigation was recessed for five weeks so that one of the three government attorneys working with the grand jury could take a vacation. (Government brief, 4th Cir., at 64) Later, the grand jury was recessed again for several weeks because the adult son of the same attorney was suffering from illness.

The record indicates that the grand jury proceedings were characterized by a leisurely pace which appears to have been primarily for the convenience of government counsel. The grand jury returned its indictment against Dr. MacDonald on January 24, 1975.

SUMMARY OF ARGUMENT

I.

The court of appeals in this case had jurisdiction to hear Dr. MacDonald's speedy trial claim under this Court's holding in *Cohen v. Beneficial Industrial Loan Corp.,* 337 U.S. 541 (1949) and the recent decision of *Abney v. United States,* 97 S.Ct. 2034 (1977). The claim that he was denied his right to a speedy trial is, like the double jeopardy claim in *Abney,* sufficiently independent of the merits of his case to permit immediate review. This is the same conclusion this Court had previously reached, at the urging of the government, in *United States v. Marion,* 404 U.S. 307 (1971).

In *Cohen,* this Court set forth those circumstances under which a court of appeals would have jurisdiction over an interlocutory appeal from the decision of a district court. In *Abney,* this Court explained and applied the principles of *Cohen* to allow a criminal defendant to bring an interlocutory appeal from the denial of his claim of double jeopardy. *Abney* held that for an order to be appealable within the meaning of *Cohen,* the decision of the district court must be final, must resolve an issue collateral to the

main cause of action, and must involve an important right which would be lost, probably irreparably, if review had to await final judgment. 97 S.Ct. at 2040.

Dr. MacDonald's claim fits these criteria perfectly, and the court of appeals' exercise of jurisdiction was therefore both correct and unremarkable.

The government argues that Dr. MacDonald's speedy trial claim is not collateral within the meaning of *Cohen* and *Abney* because it is not sufficiently independent of the outcome of the trial itself. Government brief, at 36. Yet, the government has previously argued with success the proposition that the speedy trial issue is an "extraneous factor," unrelated to the outcome of the trial or the accused's guilt or innocence. Government brief in *United States v. Marion*, No. 810, at 13 (1970). Furthermore, this Court agreed that the denial of a speedy trial was a factor having nothing to do with guilt or innocence. *United States v. Marion, supra,* 404 U.S. at 312.

This Court's analysis of whether speedy trial is an "extraneous issue" closely parallels its analysis in *Abney* of whether a double jeopardy claim is "collateral." When the two are compared, it becomes apparent that to rule that a speedy trial claim is not collateral would be a repudiation of the decisions in *Cohen, Abney* and *Marion*.

The government has suggested that the district court's ruling was tentative (until there was a trial), and therefore did not meet the finality test of *Cohen* and *Abney*. In doing so, the government ignores the admonition that the *Cohen* tests are to be given a practical rather than a technical construction.

This Court's ruling in *Strunk v. United States*, 412 U.S. 434 (1973), and the reasoning in *Abney* make it clear that this guarantee means the right to be entirely free from a trial that is a less than a speedy one. Therefore, the district court's refusal to vindicate Dr. MacDonald's Sixth Amendment right was, as was the decision

by the lower court in *Abney*, a complete and final rejection of the claim.

Cohen and *Abney* require that there be a need for immediate appellate review in order for the court of appeals to have jurisdiction. Were a trial wrongfully held in contravention of *Strunk*, Dr. MacDonald's Sixth Amendment right would be irretrievably lost. Thus, only immediate appellate review of the district judge's decision could effectively vindicate Dr. MacDonald's right to have the indictment against him dismissed without a trial.

This Court in *Cohen* held that interlocutory appeals should be allowed in cases where the "rights asserted in the action [are] too important to be denied review." 337 U.S. at 546. The speedy trial right is "as fundamental as any of the rights guaranteed by the Sixth Amendment." *Klopfer v. North Carolina, supra,* 386 U.S. at 223. Yet, the position advocated by the government would result in a right to a speedy trial which would be only available to the guilty, who could appeal after conviction. But, it would be a right which an innocent accused could never have vindicated. The notion that acquittal is a sufficient remedy for a speedy trial violation is at odds with this Court's view in *Klopfer* that dismissal of the indictment is the *only* fully satisfactory remedy.

The government also argues that if interlocutory appeals of speedy trial claims were allowed, there would be a burden on the courts of appeals. However, the government is only able to point to two interlocutory appeals of speedy trial claims in the past twenty-eight years.

II.

We agree with the suggestion of the government that if this Court concludes that the Fourth Circuit did not have jurisdiction to consider the respondent's speedy trial claim that it should vacate the judgment of that court and remand the case without considering the merits of that issue. Government brief, at 47-48. However, if the Court concludes that jurisdiction was properly exercised in regard to the speedy trial issue, then it is submitted that the judgment of the lower court should be affirmed.

In upholding Dr. MacDonald's contention that he was denied his right to a speedy trial, the court below relied upon the standards set down by this Court in *Barker v. Wingo,* 407 U.S. 514 (1972). The application of these criteria was precise, accurate and unexceptional. And, they were applied to a case that, on its facts, is concededly unique and extraordinary.

After having been formally accused of the murders of his family in 1970, Dr. MacDonald was not indicted for these offenses until January 1975. His case is one which presents the issue of whether a delay of nearly five years between public accusation and indictment constitutes a denial of speedy trial rights under the Sixth Amendment.

The government brief does not recognize this case as one brought under the Sixth Amendment. The government would have this Court believe that all the events that took place prior to the grand jury's activities in this case, including the Article 32 proceedings, the CID reinvestigations, and public knowledge of the continued accusation of Dr. MacDonald, were matters of virtually no consequence for speedy trial purposes.

Because this is a case under the Sixth Amendment, the court below was required to apply the test set down in *Barker v. Wingo, supra,* 407 U.S. 514. It did so, and on each of the four factors of that test found that they weighed heavily against the government.

The length of delay in this case between public accusation and indictment was nearly five years. It was extreme delay and compared favorably with the period in *Barker,* which this Court held was more than sufficient to serve as the "triggering mechanism" making it necessary to examine the remaining criteria. The government did not contest the conclusion of the court below on this factor.

The second of the *Barker* criteria to be considered is the reason assigned by the government for the delay. The government

has offered three different explanations. In its brief to this Court, the government contends that it needed from the end of the CID reinvestigation in 1972 until May 1974 to conclude that there were unanswered questions in this case which should be subjected to a grand jury investigation. In fact, the grand jury proceedings were a repeat of the Article 32 proceedings. The only "new" element was the testimony of FBI laboratory personnel presenting new opinions on the old physical evidence. It is clear that it was not necessary to convene a grand jury in order for the Department of Justice to obtain the opinions of the FBI.

The government also attempted to explain the five-year delay in having the physical evidence examined by the FBI laboratory as being the result of "government bureaucracy." And, its third explanation was that the delay was the result of the *MacDonald* file being passed from one government attorney to another for reviewing and rereviewing the case but never arriving at a resolution.

The court below found that the government had not satisfactorily explained the extraordinary delay and weighed this factor heavily against it.

The third factor considered by the Fourth Circuit in its *Barker* analysis was the accused's assertion of his speedy trial right. That court concluded that Dr. MacDonald's repeated requests to the Justice Department for a resolution of his case, and his willingness to submit to interrogation by government lawyers was an assertion of his speedy trial right.

The government's contention that an accused must demand to be prosecuted has been previously rejected by this Court in *Barker.*

Finally, the court below applied the *Barker* standard of whether there was prejudice to the accused arising from the extraordinary delay. It found, and the record amply supports the conclusion, that Dr. MacDonald has suffered actual prejudice as the result

of the altered memory of witnesses. He has also been prejudiced in his ability to defend himself which has been severely compromised because of the deterioration and the age of the physical evidence. It also found he had been prejudiced because of the anxiety and concern arising from being an accused for nearly five years.

The government's contention that only actual prejudice can support a speedy trial claim was rejected by this Court in *Moore v. Arizona,* 414 U.S. 25 (1973).

The government urges that because there was no formal charge against Dr. MacDonald from the end of the military proceedings until the return of the indictment that no speedy trial rights were implicated during that period. That argument must fail because there is no significant difference between the situation in *Klopfer v. North Carolina, supra,* and the one in the present case.

This Court in *United States v. Lovasco,* 97 S.Ct. 2044 (1977), said that the speedy trial right does not attach to pre-accusation delay because it is desirable to allow considerable discretion to prosecutors as to when charges should be brought. Having granted such latitude in the pre-accusation period, this Court cannot have intended to also excuse post-accusation delay from Sixth Amendment scrutiny.

ARGUMENT

I.

DENIAL OF RESPONDENT'S MOTION TO DISMISS THE INDICTMENT ON SPEEDY TRIAL GROUNDS WAS A FINAL ORDER, IMMEDIATELY APPEALABLE, WITHIN THE MEANING OF COHEN v. BENEFICIAL INDUSTRIAL LOAN CORP.

A. Introduction.

The court of appeals decision to allow respondent to present his speedy trial claim to that court was correct and supportable under the teachings of this Court's decisions in *Cohen v. Beneficial*

Industrial Loan Corp., 337 U.S. 541 (1949), and *Abney v. United States,* 97 S.Ct. 2034 (1977). Although the Fourth Circuit phrased its exercise of jurisdiction, under 28 U.S.C. § 1291, as "pendent" and "closely related to" exercise of interlocutory appeals jurisdiction regarding respondent's double jeopardy claim,[33] the court of appeals also recognized that there was basis of jurisdiction independent of the double jeopardy claim.[34] Speedy trial, like double jeopardy, is one of "that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen v. Beneficial Industrial Loan Corp., supra,* 337 U.S. at 546.

Contrary to its argument now, the government argued this very point to this Court in *United States v. Marion,* 404 U.S. 307 (1971). And the Court adopted almost *in haec verba* the position of the government: speedy trial is a truly collateral issue, capable of treatment by courts of appeals as completely separate from the merits of the case against a criminal defendant. The labored explanation why that is *not* the case, now offered by the government to this Court, should be rejected as a novel attempt by the government to undermine this Court's long-standing rule articulated in *Cohen* and followed in *Abney.*

B. The Cohen Standards.

This past term, the Court in *Abney v. United States,* 97 S.Ct. 2034 (1977), explained and applied the principles of *Cohen v. Beneficial Industrial Loan Corp., supra,* 337 U.S. 541 (Jackson,

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33. Which the Fourth Circuit found to be "not fanciful," but declined to decide in view of its speedy trial decision.

34. The Fourth Circuit noted that Dr. MacDonald's claim "is also collateral and can be decided without considering the merits of the charges against MacDonald. The guarantee of a speedy trial is a fundamental constitutional right." *United States v. MacDonald, supra,* 531 F.2d at 199.

J.) to allow a criminal defendant an interlocutory appeal from the denial of his claim of double jeopardy, but not to appeal a claim for dismissal of an indictment. The Court in *Abney* pointed out several factors which it reviewed to decide the question of "finality": (1) the district court's order must be "final" in that it does not leave the matter "open, unfinished or inconclusive"; (2) the district court's order must "resolve an issue completely collateral to the cause of action asserted"; (3) the district court's action must involve an "important right which would be 'lost, probably irreparably, if review had to await final judgment.' " 97 S.Ct. at 2040. These tests are to be given a "practical rather than a technical construction." *Id.*

Finally, in summary, the Chief Justice in *Abney* quoted the *Cohen* observation that, for interlocutory appellate relief:

> [The] decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. 97 S.Ct. at 2040.

All of these criteria, when matched against Dr. MacDonald's speedy trial claims, fit perfectly. Thus, the Fourth Circuit's exercise of jurisdiction was unexceptional, and should be affirmed.

C. Respondent's Claim Of Denial Of His Speedy Trial Right Is Collateral To The Issues Of The Case.

In actuality, this Court has already decided that a speedy trial issue is collateral to the principal issue of guilt or innocence in a criminal proceeding. And, it decided that issue at the government's urging. It comes as something of a surprise, then, that the government now is asking this Court to overturn the prior decision for which it had argued so strongly.

In *United States v. Marion, supra,* 404 U.S. 307, as a preliminary matter, the Court was faced with a criminal defendant's

claim that there was no jurisdiction under the Criminal Appeals Act, 18 U.S.C. § 3731 (Supp. V 1964) because the district court's granting of defendant's speedy trial motion was not a "decision or judgment sustaining a motion in bar . . ."

The government, which was urging that the Court had jurisdiction under that Act, argued that granting of a speedy trial motion did indeed sustain a motion in bar. In so arguing, the government's brief described with great articulateness what the nature of a speedy trial claim is, compared to the main issue of a criminal trial. "[T]he defendant [does] not deny that he had committed the acts charged or that those acts [constitute] a crime, but nevertheless [urges] that he [can] not be prosecuted because of some *extraneous factor,* such as the tolling of the statute of limitations *or the denial of a speedy trial.*" Government brief in *United States v. Marion,* No. 810, at 13 (1970) (emphasis added). In its reply brief in *Marion,* the government returned to this description of the speedy trial claim: "[Such a plea] sets up by way of defense a claim that bars conviction *whether or not the defendant is guilt.* [sic]" Government reply brief, at 3 (emphasis added).

The touchstone of the claim, then, as the government saw it in *Marion* was that a speedy trial claim makes no attempt to litigate the main issue of a case, *i.e.,* the guilt or innocence of the defendant. Rather it is totally separable from that issue, that is, *collateral to* ("extraneous" to) the guilt or innocence of the accused.

The Court agreed wholeheartedly with the government's position:

> The motion to dismiss rested on grounds that had nothing to do with guilt or innocence or the truth of the allegations in the indictment but was, rather, a plea in the nature of confession and avoidance, that is, where the defendant does not deny that he has committed the acts alleged and that the acts were a crime but instead pleads that he cannot be prosecuted because of some *extraneous factor, such as*

> the running of the statute of limitations or *the denial of a speedy trial. United States v. Marion, supra,* 404 U.S. at 312 (White, J.) (emphasis added).

When this Court last term faced the issue in *Abney,* of whether denial of a double jeopardy claim is a "collateral" matter, it articulated the "collateralness" test in almost exactly the same words as the "extraneous issue" phraseology of *Marion.* Below we quote from Chief Justice Burger's opinion in *Abney,* substituting the words "speedy trial" for "double jeopardy." We suggest that the match between *Marion, Abney* and *Cohen* is exact:

> [T]he very nature of a [speedy trial] claim is such that it is collateral to, and separable from the principal issue at the accused's impending criminal trial, *i.e.,* whether or not the accused is guilty of the offense charged . . . . [T]he defendant makes no challenge whatsoever to the merits of the charge against him. Nor does he seek suppression of evidence which the Government plans to use in obtaining a conviction . . . . Rather, he is contesting the very authority of the Government to hale him into court to face trial on the charge against him. [Citations omitted] The elements of that claim are completely independent of his guilt or innocence.
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> * * * * * *
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> Thus, the matters embraced in the trial court's pretrial order here are truly collateral to the criminal prosecution itself in the sense that they will not "affect or . . . be affected by, decision of the merits of the case." *Abney v. United States, supra,* 97 S.Ct. at 2040-2041.

Having admitted, indeed embraced and urged, in *Marion* the proposition that speedy trial is collateral ("extraneous") to the issue of guilt or innocence, it is disingenuous at best, and wrong at worst, for the government now to take the contrary view. More importantly, it would be a repudiation of this Court's decisions in *Marion, Abney,* and *Cohen* to sustain the government's position now.

The cases are clear: a speedy trial claim is "collateral" to the main issue of a criminal prosecution, and thus meets one of the *Cohen* criteria for interlocutory appeals.

D. The District Court's Order Denying Respondent's Speedy Trial Claim Was Final.

The government argues that denial of a speedy trial claim was not "final" at the district court level, and thus cannot meet the "finality" test of *Cohen* and *Abney.* That argument misses completely what the district court ruled in this case. And, it ignores this Court's admonition that the *Cohen* tests are to be given a "practical rather than a technical construction." 337 U.S. at 546.

In denying Dr. MacDonald's speedy trial claim, the district judge held *as a matter of law* that "[t]he right to a speedy trial under the Sixth Amendment does not arise until a person has been 'accused' of a crime, and in this case this did not occur until the indictment had been returned. On the authority of *United States v. Marion,* 404 U.S. 307 (1971), the motion of defendant is denied." Pet.App. 49a.

There is nothing tentative about this ruling. It does not, on its face or by implication, indicate that anything which might later happen at trial could affect it. The judge simply held that *under no circumstances* did speedy trial rights attach prior to the indictment of Dr. MacDonald by the grand jury.

While we have argued that the district court is wrong as a matter of law in this conclusion, we nevertheless think that the district court was at least correct in recognizing, as the government refuses to recognize before this Court, that the speedy trial right embraces more than a "due process" right to a fair trial. The district court's order does not say that respondent's *due process* arguments of prejudice at trial (should those arguments become necessary as a trial develops) would be rejected out of hand. Rather, what was rejected finally and conclusively in the district

court's order were the broader range of Sixth Amendment rights as we have described them. The order concludes that *none* of those rights are engaged until time of indictment. Nothing which happens at trial could affect that ruling.

The government's brief thus totally ignores the fact of what the district court decided and instead focuses on hypothetical cases where a district court *might* rule tentatively on speedy trial motions while indicating that further trial developments will be taken into consideration. Moreover, the hypothetical nature of the government's argument does not look at the "practical rather than a technical construction" of the *Cohen* and *Abney* finality tests.

It is now beyond arguing that, if a defendant has a valid speedy trial claim (just as if he has a valid double jeopardy claim), his constitutional right is a right *not to be tried at all.* This is the holding of the Court in *Strunk v. United States, supra,* 412 U.S. at 440, (Burger, C.J.), where the Chief Justice speaking for the Court (as he did in *Abney*) held that once a defendant's speedy trial right has been found to be violated, "dismissal must remain . . . 'the only possible remedy.' "[35]

35. Not only did this Court hold in *Strunk* that a speedy trial right is a right not to be tried at all (so that if the district court denies the right, that is "final rejection of a criminal defendant's . . . claim" because he will have to stand trial, even if he is later acquitted), but the government used that argument in its *Marion* brief and has operated under that result ever since. The government correctly pointed out in *Marion* that undue delay is, from an analytical constitutional viewpoint, a wrong done by the government for which there is no remedy (except of course dismissal). *See* Government reply brief in *Marion,* at 2. The Court agreed. 404 U.S. at 313.

The issue under discussion in *Marion* was whether preindictment delay triggered speedy trial rights. Analytically, however, it makes little difference when the right attaches for purposes of analyzing whether the right, once found to be violated, can be vindicated other than by dismissal. *Strunk* makes clear that there is no "curing" a violation of this right. It follows then that once a district court rules on a pretrial assertion of the right, whatever later happens at trial does not affect the facts which have already passed into history as, we are supposing, a transgression of the Sixth Amendment.

Again, what this Court said in *Abney* should be dispositive of the government's argument now. Regarding finality, if we again substitute "speedy trial" for "double jeopardy," the Court said:

> [T]here can be no doubt that such orders constitute a complete, formal and, in the trial court, a final rejection of a criminal defendant's [speedy trial] claim. There are simply no further steps that can be taken in the District Court to avoid the trial the defendant maintains is barred by the [Sixth Amendment's] guarantee. Hence, *Cohen's* threshold requirement of a fully consummated decision is satisfied. 97 S.Ct. at 2040.

Thus, since the speedy trial right is a right not to be tried at all (*i.e.,* to have the indictment dismissed) if the right is found violated, the district court's refusal to vindicate that right was complete and final. At the district court level, nothing is left "open, unfinished or inconclusive" about what the district court's views on speedy trial were. That is particularly true here, where the district judge was absolutely clear that he was rejecting respondent's speedy trial claim as a matter of law, with no relation at all to the facts of the case. What he did, taken together with the rationale of *Abney* and *Cohen,* shows a "finality" in the district court's ruling which gave the court of appeals jurisdiction to review respondent's Sixth Amendment claim.

E. There Is A Need For Immediate Appellate Review Of The District Court's Order, Or Else Respondent's Speedy Trial Right Is Forever Lost.

As we have noted, the district court flatly rejected the speedy trial argument of respondent, and continued the march toward trial. But as we have also seen, if the lower court was wrong (as the Fourth Circuit found), if Dr. MacDonald had indeed

been denied his Sixth Amendment right, then he was on the verge of losing that right forever if his appeal could not be heard at that juncture. This conclusion must follow from an examination of the interests, as spelled out by this Court, which the speedy trial right was intended to protect. High among these was the interest in protecting an accused from prejudice, including that prejudice which arises from anxiety and concern, *Barker v. Wingo, supra,* 407 U.S. at 532, from public scorn, *Klopfer v. North Carolina, supra,* 386 U.S. at 222, and from obloquy, *Marion v. United States, supra,* 404 U.S. at 320.

This Court has referred to the same considerations in discussing the interests that the double jeopardy provision was designed to protect. *Abney v. United States, supra.* And it concluded that the double jeopardy claim must be reviewable pre-trial because the very occurrence of a second trial would subject the accused to anxiety, concern, public scorn and obloquy.

And so it is with the speedy trial right. If that right means anything it is to be entirely free from a trial that is less than speedy. Only immediate appellate review can vindicate the right to have the indictment dismissed without a trial. Thus, the third test of *Abney* and *Cohen* is met here.

F. The Speedy Trial Right Is "Too Important To Be Denied Review."

Justice Jackson, speaking for the Court in *Cohen,* articulated a reasonable, practical interpretation for interlocutory review of certain lower court decisions. We have already analyzed the standards which *Cohen* set forth, and have demonstrated that all of those standards apply to this case. However, a further comment is in order about the nature of the Sixth Amendment's speedy trial guarantee because the Court in *Cohen* said that interlocutory

appeals should be allowed in cases where the "rights asserted in the action [are] too important to be denied review." 337 U.S. at 546.

This practical constitutional advice was quoted with approval by the court in *Abney, supra,* 97 S.Ct. at 2040. The speedy trial right certainly falls within that category of important rights. It is specifically enumerated in the Sixth Amendment, and does not rest on any statutory basis.[36] This Court has held it is "as fundamental as any of the rights secured by the Sixth Amendment. That right has its roots at the very foundation of our English law heritage." *Klopfer v. North Carolina, supra,* 386 U.S. at 223. It is a right which is so fundamental and important that the only remedy for violation is dismissal of the indictment. *Strunk v. United States, supra,* 412 U.S. 434.[37]

The government's position before this Court denigrates this right into insignificance. With cavalier abandon, the government says that a post-conviction review of this most "fundamental as any of the rights secured by the Sixth Amendment" is all that is required. Government brief, at 37. What this overlooks is that an accused man who is found innocent of the charges *never* has his right vindicated. His acquittal, after the burden of trial, is supposed to make up for all the grief of an unconstitutionally long delay.

The government has, in a curiously offhanded way, articulated to this Court a speedy trial right which applies only to persons convicted of crimes. Innocent persons do not have any right to a speedy trial which can be enforced. That view cannot be espoused

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36. Compare this right with, for example, a statute of limitations right which the government apparently conceded in *Marion* would be a "collateral" issue within the meaning of *Cohen.*

37. Contrast this right, for example, with the right against illegal search and seizure where the remedy may be suppression of evidence, but the government may nevertheless pursue the trial.

by the Court while its holding in *Klopfer* stands. Certainly the Sixth Amendment was supposed by the framers to apply at least as much to innocent men as to guilty. By postponing relief until after conviction, the Sixth Amendment becomes only the refuge of the guilty. Such an important right cannot be laid to rest so summarily.

G. Interlocutory Appeals From The Denial Of Speedy Trial Motions Are A "Small Class" Of Criminal Matters Which Courts Of Appeals Should Dispose Of Promptly.

All of the criteria of *Cohen* and *Abney* are met by denial of speedy trial motions. Nevertheless, it is fair to inquire as to the practical effects of approving interlocutory appeals, although strictly speaking, as the government points out in its brief, "[a]ppeal rights cannot depend on the facts of a particular case." *Carroll v. United States,* 354 U.S. 394, 405 (1957) (quoted by the government in its brief, at 25). This, of course, is true even if appeal rights become a burden on courts and prosecutors. This specter, however, is not present here.

First, there are only a few matters in criminal cases which are amenable to interlocutory appeals under the *Cohen-Abney* line of authority. Of course, double jeopardy is one, as *Abney* held. Bail is another. *Stack v. Boyle,* 342 U.S. 1 (1951). However, it is difficult to think of other situations where all the tests of *Cohen* and *Abney* are met. A holding that speedy trial issues may be appealed pretrial does not, therefore, substantially broaden the number of issues which will face courts of appeals.

Second, the government's argument that speedy trial issues will swamp the courts of appeals with frivolous appeals is unsupported by any basis. As the government itself points out, only two reported federal cases have presented to the courts of appeals an interlocutory challenge to a denial of speedy trial motions since *Cohen* was decided in 1949. *See* Government brief, at 23.

There is no reason to think that this miniscule number of cases will suddenly explode should the Fourth Circuit's decision be affirmed here.[38]

The government argues that almost any criminal defendant can make a "colorable speedy trial claim." Government brief, at 46. Even if that were true, the courts of appeals can easily cope with such frivolous claims. The Fourth Circuit in this very case recognized that not every speedy trial claim merits full review. 531 F.2d at 199. While we do not urge that courts of appeals could pick and choose which speedy trial claims may be *filed* as interlocutory matters, we certainly do maintain that courts of appeals can and will develop a facility for screening out those claims which on their face are not so unique and compelling (such as Dr. MacDonald's case was) that full argument is required. Courts of appeals can and will quickly decide how to review frivolous claims as an interlocutory matter, leaving to post-judgment review any further developments which a defendant can show impacted him from a due process standpoint. *See United States v. Lovasco, supra,* 97 S.Ct. 2044. There is no reason to think that courts of appeals will be unable to cope with frivolous matters, and there is no reason to think that members of the defense bar will engage in non-productive dilatory tactics, as the government seems to argue.

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38. An inquiry made to the Division of Information Systems of the Administrative Office of the United States Courts revealed that the office no longer publishes figures on the number of interlocutory appeals taken to the courts of appeals. Such data were collected and published until 1970. Publication was discontinued thereafter, however, because of the small number of cases involved.

The figures for the year 1970, however, are of interest. In that year, a total of 291 applications were made for interlocutory appeals in *all* courts of appeals. The figure does not indicate, and data are apparently not available to show, what proportion of these cases were criminal matters.

History demonstrates that it is most often the government, not the defendant, that violates the speedy trial clause.[39] It should not overly concern this Court that the government hypothesizes that in the future the tables might be turned.

II.

THE DETERMINATION THAT RESPONDENT WAS DENIED HIS RIGHT TO A SPEEDY TRIAL WAS CONSISTENT WITH THE RULINGS OF THIS COURT

A. Introduction

In making its determination that the unwarranted five-year delay by the government had denied Dr. MacDonald his right to a speedy trial, the Fourth Circuit properly employed the standards enunciated by this Court in *Barker v. Wingo, supra,* 407 U.S. 514. *United States v. MacDonald, supra,* 531 F.2d at 202-208. It is undisputed that these standards are the appropriate ones by

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39. The government argues in its brief, at 47 n. 22, that this case illustrates the delay inherent in the appellate process. We suggest that in point of fact this case shows that it is the government, either through inefficiency or tactical advantage, that delays the criminal process:

1. The government complains of a delay of six months between the decisions of the district court and the decision of the court below. It omits the fact that this delay came in part from the request of the government that it be permitted to file an unprecedented response to the respondent's reply brief.
2. The government complains of the three months taken by the court below between the date of its decision and its denial of the petition for a rehearing. It omits the fact that a portion of that time represents an extension of time granted to the government to seek rehearing.
3. The government complains of the delay in this Court. It omits the fact that: (a) the government sought and obtained the maximum extension of time to file its jurisdictional statement; (b) that the government successfully urged this Court to hold this case for a year on the basis of an incorrect assertion that the issues would be resolved in another case; (c) that the government twice obtained extensions to file its brief on the merits; and (d) that despite the extensions it filed its brief late.

which to judge the Sixth Amendment claim that an accused has been denied his right to a speedy trial. *See Barker v. Wingo, supra,* 407 U.S. at 530; Government brief, at 58 n. 27.

The court below took the extraordinary facts of this case[40] and applied the *Barker* balancing test, in which it weighed the conduct of both Dr. MacDonald and the prosecution. The court found that each of the factors to be considered—that is, the length of the delay, the reason for the delay, the accused's assertion of his Sixth Amendment right, and the prejudice accruing to the accused—weighed in favor of Dr. MacDonald and against the government. A review of that analysis will show that the application of those criteria was both precise, and accurate and unexceptional.

B. The Length of Delay

The length of the delay, nearly five years from the formal accusation of Dr. MacDonald until indictment, was by any analysis an extreme one. He was arrested and charged with murder by the Army on May 1, 1970, therefore becoming an "accused" within the meaning of the Sixth Amendment, whereupon his speedy trial rights were triggered. *United States v. Marion, supra,* 404 U.S. 307. He was not indicted until January 24, 1975, more than four and one-half years later, only a few days less than five years from when the murders had been committed.

The Court in *Barker, supra,* 407 U.S. at 530, explained that the length of the delay is the "triggering mechanism" which determines whether it is necessary to consider the other three criteria. The Fourth Circuit pointed out that the "extraordinary" delay in *Barker* of five years was considered more than sufficient by this Court to require inquiry into the other criteria. *United States v. MacDonald, supra,* 531 F.2d at 205.

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40. Government's Memorandum in Opposition at 4 in *MacDonald v. United States, cert. denied,* 423 U.S. 926, 927 (1975); *United States v. MacDonald, supra,* 531 F. 2d at 199.

It also noted that in *United States v. Macino*, 486 F.2d 750 (7th Cir. 1973), a 28-month delay between arrest and indictment had been considered "excessive." *United States v. MacDonald, supra*, 531 F.2d at 205. *See also United States v. Strunk*, 467 F.2d 969 (7th Cir. 1972), *rev'd on other grounds, Strunk v. United States*, 412 U.S. 434 (1973).

The government in the present case has never denied that its delay of five years was sufficient in length to have served as the "trigger" for the remainder of the *Barker* analysis.[41]

While the period of unjustified delay in this case is more than three years, the *total* delay between the government's initial accusation of Dr. MacDonald and its indictment was nearly five years, or as long as that in *Barker*. It is undisputed that it is this entire period which is to be taken into account when deciding whether further examination is required. The Fourth Circuit was following the dictates of *Barker* when it concluded that:

> [T]he delay in MacDonald's case is sufficiently long to justify "inquiry into the other factors that go into the balance" of assessing [his] claim that he has been denied a speedy trial. *United States v. MacDonald, supra*, 531 F.2d at 205 (citation omitted).

The government argues that it should escape the effect of the five-year delay in this case because after the dismissal of the charges by the Army, there was no formal accusation pending against Dr. MacDonald. This is similar to the view of the lower court in *Klopfer v. North Carolina*, which had concluded that the right to a speedy trial does not afford affirmative protection against an unjustified postponement of trial for an accused discharged from custody. 386 U.S. at 219.

41. The only observation which the government makes in this regard is that such a delay, in and of itself, is insufficient to establish the violation of the Sixth Amendment right. Government brief, at 58 n.27. Dr. MacDonald has never contended otherwise.

This Court explicitly rejected that view and held that it violated the right to a speedy trial because the failure to proceed with a prosecution "indefinitely prolong[ed the] oppression, as well as the 'anxiety and concern accompanying public accusation.'" *Klopfer v. North Carolina, supra*, 386 U.S. at 222, quoting from *United States v. Ewell*, 383 U.S. 116 at 120 (1966).

It is clear that the instruction of the Speedy Trial Clause, as articulated in the views of this Court in *Klopfer*, is that once there has been a public accusation—that is, prosecution has begun—the government has only two choices: either to bring the case to trial and verdict, or to terminate it by means such that the defendant cannot be tried again.

There is no middle ground, no legal limbo into which an accused may be cast after a public accusation while the government proceeds at a "leisurely pace . . . primarily for [its own] convenience." *United States v. MacDonald, supra*, 531 F.2d at 206. To tolerate such a situation is to expose an accused to every harm this Court warned against in *Klopfer*.

It is not inconsistent with public policy to require the prosecution to proceed expeditiously to a resolution of a case after the public accusation has been made. Cf. Government brief, at 60-61. It is the prosecutors who have broad discretion as to when to commence a case. It is they who control the timing for triggering an accusation. The decision of this Court in *United States v. Lovasco, supra*, 97 S.Ct. 2044, assures prosecutors that they are free to proceed with the investigation and evaluation of a case in an orderly manner, without concern for judicial second-guessing. Absent delay that amounts to a due process violation, any delay prior to charging will not be reviewed by the courts.

Conversely, implied in *Lovasco* is the notion that once an accusation is made, the prosecutor must thereafter proceed with due respect for speedy trial rights. Delay may still be necessary, and even justifiable after this point. But, any unusual delay will

require a strict accounting. And, it is to be measured by applying the standards enunciated in *Barker*.

C. The Reason For The Delay

The second *Barker* criterion which must be examined is the reason the government assigns for the delay. The weight to be given the reasons for delay will vary with each explanation. *Barker, supra,* 407 U.S. at 531. This Court offered some examples in *Barker* of acceptable and unacceptable reasons:

> A deliberate attempt to delay the trial in order to hamper the defense should be weighed heavily against the government. A more neutral reason such as negligence . . . should be considered since the ultimate responsibility for the circumstances must rest with the government rather than with the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay. *Id.* (footnote omitted)

Dr. MacDonald does not claim that the delay in his case was the result of a deliberate attempt by the government to hamper his defense. And, the government has not suggested that its five-year delay resulted because of a missing witness or a similar, related reason. Rather, the examination of the record in this case reveals that it is in the middle ground of negligence and indifference to Dr. MacDonald's constitutional rights that the cause of the delay in this case is to be found.

The government has taken varying positions at varying times in its effort to offer a suitable explanation for its delay. In its brief to this Court, the government contends that it took the Department of Justice until May 1974 to conclude that there were many unanswered questions in this case which could only be resolved by use of the investigative powers of a grand jury. Government brief, at 12.

A second explanation, which the government offered the Fourth Circuit and the magistrate at Dr. MacDonald's bail reduction

hearing, was that it took from 1970 to 1974 for the Department of Justice to get the FBI laboratory involved in the examination of the physical evidence. A. 111.

The third explanation the government offers for the delays was the need for Department of Justice attorneys to become familiar with the case as the MacDonald files were passed from one attorney to another. A. 87.

Close examination of each of these explanations finds them totally inadequate to excuse the extraordinary delay in this case.

The Department of Justice received the report of the CID reinvestigation in June 1972. But, the case was not being submitted to the Department for a first-time examination. It had been "monitoring" the case since shortly after Dr. MacDonald's arrest by the Army. Government brief, 4th Cir., at 57. When the issue was raised as to which federal law enforcement agency should conduct the reinvestigation of the murders, it was the Department that recommended in 1971 that the CID assume this responsibility. And, as the reinvestigation progressed, the Department was involved, including arranging for laboratory tests of the physical evidence by the FBI and Treasury Department. Government brief, 4th Cir., at 61.

Despite the fact that it had been involved in the case for two years, and that it had received the 13-volume report from the CID in 1972, the Department of Justice nevertheless still failed to act. Instead, the files were "assigned and reassigned" and "reviewed and re-reviewed" by a succession of attorneys. A. 87.

That the case was susceptible of being reviewed, evaluated and acted upon without years of delay is made manifest by the actions of the few persons who actually recognized the need for a decision.

Colonel Rock, after four months of Article 32 proceedings, and with 2,000 pages of transcripts, CID laboratory reports and other evidence, was able to review, evaluate and arrive at con-

clusions, and to prepare a 90-page report of his work in one month. A. 113, 136.

United States Attorney McNamara was appointed to his position in Raleigh, North Carolina, in September 1972. He was able to assume the duties of his office, of which the MacDonald case was only a part, and become familiar enough with the case to submit in March 1973 a fifty-four-page memorandum to the Department of Justice recommending prosecution and asking for the assistance of a trial lawyer. Government brief, 4th Cir., at 62.

Justice Department attorney Woerheide had the case reassigned to him in May 1974. He required only a month to read and evaluate the file, arrange for a grand jury, and be ready to start presenting evidence. Government brief, 4th Cir., at 63.

Even the CID, which took eleven months to complete the reinvestigation, was able to prepare and file its 13-volume report with recommendations in six months.

Nowhere in its brief does the government squarely confront the question of why it took more than two years after the filing of the CID reinvestigation report to arrive at a conclusion that there were still unanswered questions which needed to be submitted to a grand jury.

That the matter was essentially ignored by the Department is implicit from the government's brief:

> After these additional reports[42] were received, no significant progress in the investigation was made until May 1974,

42. The government concedes that there was no significant investigative activity between December 1971, when the CID finished its reinvestigation, and May 1974. The CID report was filed in June 1972. The passing reference to additional reports in the government's brief, at 68, is worthy of comment.

The "First supplemental report of investigation" concerned the results of a brief investigation of a vague "lead" from an informant. Government brief, 4th Cir., at 61-62.

The "Second supplemental report of investigation" concerned the effort of a government physicist to prove theoretically that the coffee table in the MacDonald living room would always turn upside down. Government brief, 4th Cir., at 62. He was unable to prove the proposition. *Cf.* A. 200-201.

> when it was determined to utilize the services of the FBI and the grand jury in a final effort to sift through the evidence and to reach conclusions about the case. Government brief, at 68.

In point of fact, the same questions that the government wanted a grand jury to "sift through" were the very questions which had been known to the investigators from the time the CID laboratory filed its reports in April 1970.

The suggestion that this sifting process could only be done through the use of the grand jury is unsubstantiated. The grand jury testimony was essentially a repeat of the evidence heard at the Article 32 proceedings, as revealed by the list of witnesses actually called. Government brief, 4th Cir., at 65-66. The only difference was the calling of FBI laboratory personnel to give new opinions about the old physical evidence.

But, of course, it is clear that the grand jury was not needed in order to obtain the opinions of the FBI. Government brief, 4th Cir., at 60.

A more candid explanation of the ongoing delays was offered by the Assistant United States Attorney, who was one of the three government attorneys who presented the evidence to the grand jury. He was challenged at the bail reduction hearing on the issues of the five-year delay and the absence of any new evidence in the case against Dr. MacDonald. In the colloquy that took place between the United States Magistrate and counsel for the government, he provided the answer:

> The Magistrate: But this evidence has been gone over—this evidence is four or five years old now . . .
>
> [Assistant United States Attorney]: Yes. The evidence with regard to the pajama top, the bath mat and the sheet: All that evidence has been produced *within the last five months* by the FBI Lab.
>
> The Magistrate: But that evidence—the analysis of that evidence was within the last five months, is that correct?

[Assistant United States Attorney]: Yes, sir. The evidence *was in existence the whole time*. The bloody sheet, the bath mat and the . . .

The Magistrate: The time—three to four years passed between the creation of the evidence and its analysis?

[Assistant United States Attorney]: That's correct.

A. 110-111 emphasis added.

When the Magistrate asked counsel for the government to explain the delay, he was told that "government bureaucracy" was to blame. A. 111.

The court of appeals did not misapply the criteria of this Court when it concluded that this is an unacceptable excuse for delaying the prosecution of Dr. MacDonald. "Government bureaucracy" is another way of saying that the Justice Department was unable to regulate itself and to meet the obligations imposed upon it by the Sixth Amendment to "move with the dispatch that is appropriate to assure an accused an early and proper disposition of the charges against him." *United States v. Marion, supra,* 404 U.S. at 313.

If the court of appeals had not rejected the "government bureaucracy" excuse in this case, then every government delay would have to be excused on the ground that it was the best that can be expected from inefficient, indifferent and even negligent prosecution agencies.[43]

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43. The Speedy Trial Act of 1974, 18 U.S.C. (Supp. V) 3161 *et seq.*, referred to in the Government brief at 61, has no applicability to the present case. Its effective date was July 1, 1975. The indictment of Dr. MacDonald was on January 24, 1975.

Although this statute was enacted as a further protection of the speedy trial rights of an accused, the government suggests a reading that would allow prosecutors the right to even greater delay than prior to its adoption. Under the government view, a prosecutor who has brought a charge and thereafter is unable to keep pace with the rather mechanical schedule in the Act, can avoid its sanctions by the expedient of dismissing the charges. Thereafter, the prosecutor could wait months or even years, then renew the prosecution and only have the time between the original accusation and the dismissal charged against him for the purposes of the Act. Such a result is clearly unacceptable.

Part of the "government bureaucracy" delay was due to the time consumed to allow a succession of attorneys to "become familiar" with the case. This was the third of the government's explanations for the delay. The affidavit of Deputy Assistant Attorney General Kevin T. Maroney described the process:

> The case was assigned and reassigned to various staff attorneys, of the General Crimes Section, who repeatedly reviewed and re-reviewed the matter. Numerous conferences were held . . . A. 87.

However, Mr. Maroney never explains what action, if any, the Department of Justice took as a result of this constant review and re-review of the matter. The government itself offered no reason why so many attorneys were used. Nor, when one attorney had studied the case, why he or she did not submit a recommendation as to the disposition to be made of the case. Yet, when the matter was finally turned over to a Justice Department attorney with instructions to proceed with the case, he was able to review all the files and commence the presentation of evidence to the grand jury within one month after being assigned to the matter.

Perhaps, as this Court suggested in *Dickey v. Florida,* 398 U.S. 30, 38 (1970), having too few lawyers may make some delay inevitable. But, a delay resulting from having too *many* lawyers is not inevitable.

As the Fourth Circuit noted "[w]hether one attributes the delay . . . to indifference, negligence, or ineptitude, it must be weighed against the government." *United States v. MacDonald, supra,* 531 F.2d at 206-207 (citations omitted).

D. The Accused's Assertion Of His Right

The third factor this Court laid down in *Barker* is the defendant's responsibility to assert his right. The court of appeals found that Dr. MacDonald had "consistently expressed a desire to have

the case resolved" starting as early as January 1972. Pet.App.B 24a. His attorney wrote letters to the Justice Department offering the government the opportunity to question Dr. MacDonald and asking for a final decision on the matter. Pet.App.B. 2a n.5, 10a n.6 & 24a.

The accused is not required, as the government seems to suggest, to "demand that [he] be indicted." Government brief, at 58 n. 27. Such a "demand-waiver" approach was categorically rejected in *Barker v. Wingo, supra,* 407 U.S. at 528-530. The Fourth Circuit observed:

> A person in [Dr. MacDonald's] position who has been arrested but not indicted is under no compulsion to demand prosecution in order to preserve his right to a speedy trial, for the primary responsibility for bringing cases to trial rests on the government. *United States v. MacDonald, supra,* 531 F.2d at 207 (citations omitted).

Dr. MacDonald did more than just urge the Department of Justice to come to a resolution of the case. He also held himself open for interrogation by prosecutors in the hope that this would expedite the resolution he so anxiously sought.

Nor did Dr. MacDonald ever, in any way, attempt to obstruct or delay the investigation of the murders. In the total spectrum of criminal investigations, his cooperation can only be called extraordinary. Dr. MacDonald has voluntarily submitted to interrogation by the government at least eight times over five years. Immediately after the murders in February of 1970 he gave statements to both the FBI and the CID. In April of 1970, after being given *Miranda* warnings, he again agreed to be questioned by CID investigators. In the course of the Article 32 proceedings, he testified at length and was subjected to intensive cross-examination by prosecutors. He was also questioned in detail by Colonel Rock. Dr. MacDonald also was interviewed for four days by Army psychiatrists about the murders.

After his discharge from the military, when he was no longer subject to the Army's jurisdiction, Dr. MacDonald twice agreed to interviews with CID investigators despite warnings he was still the suspect in the murders. He repeatedly offered, from 1972 through 1974, to submit to questioning by attorneys of the Department of Justice. A. 89-109. And, when the grand jury was convened, he testified before that panel on two occasions for over five full days. At no time did Dr. MacDonald ever assert his privilege against self-incrimination.

The record provides ample support for the conclusion of the Fourth Circuit that "[b]oth the facts . . . and the law . . . warrant the conclusion that MacDonald reasonably asserted his right to a speedy trial" Pet.App.B 24a. By any reckoning, this factor, too, must weigh heavily on respondent's side of the balance. *Barker v. Wingo, supra,* 407 U.S. at 531-32.

E. Prejudice To The Accused

The fourth factor this Court laid down in *Barker* for judging speedy trial claims is one of prejudice to the accused. In discussing this factor, this Court said:

> Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. This Court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. *Barker v. Wingo, supra,* 407 U.S. at 532.

Dr. MacDonald has twice been subjected to confinement for a total of more than six months as a result of these charges. However, this Court has specifically held in *Klopfer v. North Carolina, supra,* 386 U.S. 213 that oppressive pretrial confinement is not required for relief under the speedy trial portion of the Constitution.

But, the real damages to Dr. MacDonald have been the continuing anxiety and concern over a five-year period generated by the government's gross indifference to the need for a final resolution; and most important has been the damaging effect of the delay on his ability to defend himself.

1. ACTUAL PREJUDICE—THE MEMORY OF WITNESSES

There is no requirement that Dr. MacDonald prove actual prejudice to his defense from the government's unjustified delays in order to vindicate his Sixth Amendment right to a speedy trial. *Moore v. Arizona,* 414 U.S. 25 (1973). Nevertheless, actual prejudice does exist in this case and is a factor that must be weighed heavily against the government.

The Fourth Circuit found that Dr. MacDonald's "claim that his ability to defend himself has been impaired is not unfounded." *United States v. MacDonald, supra,* 531 F.2d at 208. The lower court noted the serious problem of unreliability of witness memory many years after a crime. There should be no dispute over its observation that "in the five years since the murders, memories have faded and witnesses can no longer be expected to reliably recall details." *Id.*

The concern over faded memories is particularly acute in this case because the witnesses are asked to recall minute details and fragmentary matters, the importance of which were not likely to have been apparent at the time they occurred. Yet, the government seeks to resurrect and reconstruct such memories five years after the events and piece them into a circumstantial evidence case against Dr. MacDonald. This is markedly different and more dangerous than asking a witness, even five years later, to describe an event of some significance to that person, such as being the victim of a crime or observing an extraordinary event.

The Fourth Circuit pointed out some of the details around which the government's case is built and which are subject to

unreliable memory after a five-year delay: the position of the flower pot in the living room as it was observed by the first persons on the scene prior to the crime scene being disturbed; the manner in which Dr. MacDonald's pajama top was folded; the condition of the sheets and bedding in the bedroom where Mrs. MacDonald was killed. *United States v. MacDonald, supra,* 531 F.2d at 208.

But even more telling confirmation of the danger of altered memories is found in discovery materials turned over to Dr. MacDonald's counsel after the case had already been submitted to the Fourth Circuit.[44]

The assaults on the MacDonald family were made with several knives, an ice pick and a club-like stick. The stick was identified as being a piece of scrap lumber stored in the rear of the MacDonald house near an unlocked door. A. 139. But until the grand jury proceedings none of the other weapons were identified as belonging to the MacDonald household. The government, in its effort to discount Dr. MacDonald's statements that the crimes had had been committed by intruders, attempted to show that all of the weapons were, in fact, from his home. A. 145.

One person who potentially could have made this connection was Pamela Kalin, a next-door neighbor and babysitter for the MacDonalds. She was called, in fact, as a prosecution witness in the Article 32 proceedings, but was not asked to identify any of the weapons used in the assaults. A. 157-158. There is substantial reason to believe that she had been interviewed earlier by the CID and had already said she could not make such an identification.

Pamela Kalin also had been interviewed in June 1970 by one of the then military defense counsel, Michael J. Malley. She was

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44. Although the government had agreed during the pretrial proceedings in the district court to provide the defense with the grand jury testimony of certain witnesses, it had failed to do so at the time of the oral argument in the court below. Following critical comments from the bench, the government at a subsequent date released this material in accordance with the agreement between the parties. However, it was not available to the lower court.

shown government-supplied photographs of the two knives, ice pick and club. But, Kalin stated that she could not identify any of these items as coming from the MacDonald home. *See* Affidavit of Michael J. Malley, Appendix A of this brief.

However, when she was called as a witness before the grand jury more than four years later, her memory had changed markedly and favorably for the government. In fact, her memory improved between her first appearance before the grand jury in the morning and her second appearance in the afternoon.

In her morning appearance, she stated that she now believed that the MacDonalds had an ice pick. However, she did not know where it was kept in the house, and she could not identify an ice pick shown to her by government counsel as resembling the one she now remembered as being at the MacDonalds'. Grand Jury transcript, Pamela Kalin, August 27, 1974, at 23.[45]

When recalled that afternoon, however, she was able to remember that the ice pick did resemble the one being shown to her by government counsel before the grand jury.[46] *Id.* at 39. Her memory also changed to the extent that she even had a recollection as to where the ice pick was kept in the house. *Id.* at 38.

Kalin also testified in the afternoon session that she was able to identify one of the knives used in the assults as coming from the MacDonald home. *Id.* at 24.

Finally, Kalin said that she recognized the "splattered paint" on the club used in the assaults because it now "rings a bell" in her memory. *Id.* at 22.

The change in Pamela Kalin's memory after five years can only be viewed as a dramatic enhancement of the government's case.

45. The portions of the grand jury transcript referred to in this brief are reproduced and attached hereto as Appendix C.

46. The examination of this witness before the grand jury by government counsel was characterized throughout by heavy-handed, leading questions.

It has all the indications of being an instance of a witness without actual, current memory of events, responding favorably to the intensely suggestive questioning of the prosecutors. But, under any circumstances, it is the type of altered memory that prejudices Dr. MacDonald within the *Barker* standard.

2. ACTUAL PREJUDICE—THE PHYSICAL EVIDENCE

The physical evidence always has been the heart of the government's case from the beginning of the investigation in 1970. And, it is clear that the defense would be required to meet this evidence directly; that is, to show that errors in the examination of the physical evidence have led the government to a series of erroneous conclusions about the circumstances of the MacDonald family killings.[47]

Two of the key elements of the government's physical evidence are the identification of blood stains and the identification of wax drippings found in one bedroom.

The government's theory is that because minute blood stains of members of the MacDonald family were identified in rooms other than where their bodies were found, that indicates they had been moved after being killed, and it is unlikely that intruders would have done this.[48]

The failure of the government to identify the wax drippings found on the bed clothes in Kimberly MacDonald's bedroom was

47. The results of a nationwide study conducted under the auspices of the Law Enforcement Assistance Administration of the Department of Justice, and dealing with the accuracy of blood identification by crime laboratories was publicly released earlier this year. It revealed an appallingly high rate of error in such identification. *See* Law Enforcement Assistance Administration, *The Laboratory Proficiency Testing Program,* prepared for the Department of Justice, National Institute of Law Enforcement and Criminal Justice, under Grant No. 74-NI-99-0048, Dec. 1975.

48. Yet Colonel Rock observed in his report that there were "logical explanation(s)" for the location of blood types. A. 139. These include the fact that the blood could have been "carried" by the MP's, hospital personnel, intruders, or innocently by Dr. MacDonald. A. 143-144.

listed by Colonel Rock in the summary of his findings as an evidentiary factor "supportive of the accused." A. 137. The government would be expected at a trial to offer evidence as to the source of the wax.

But, while the government is prepared to build its case with these particular items of physical evidence, the ability of Dr. MacDonald to defend himself on these crucial matters has been irretrievably impaired.

Dr. John I. Thornton, a forensic scientist on the faculty of the University of California, has examined all the CID, FBI and Treasury laboratory reports in this case. Dr. Thornton states that important, sophisticated tests for the accurate identification of the blood and other physical evidence were not made by the government and are no longer possible by the defense because of the delay between the collection of this evidence and the indictment in 1975. He has also reported that the validity of defense examination of wax, if made as late as 1975, would be open to serious scientific attack by the prosecution because of the deterioration of the evidence. Dr. Thornton states:

> [T]he protracted delay imposes severe constraints on the selection and execution of tests that may be applied to various aspects of the physical evidence in this case, and that the physical evidence is not capable in all regards of being utilized by the defense.
>
> He adds:
>
> The availability of such test results could be of value in assisting the defense.[49]

Dr. MacDonald's ability to defend himself has thus been impaired because of deterioration and changes in the physical evidence during the unjustified five-year delay in this case.

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49. Dr. Thornton's Declaration is attached hereto as Appendix B.

3. PREJUDICE ARISING FROM THE ANXIETY AND CONCERN OF THE ACCUSED

Even the termination of the military proceedings against Dr. MacDonald and his release from detention "did not . . . dispel the effects of the government's initial accusation." *United States v. MacDonald, supra,* 531 F.2d at 204. The court below pointed out that "MacDonald, of course, realized that the favorable conclusion of the Article 32 proceedings was not the end of the government's efforts to convict him." *Id.* And, as a result Dr. MacDonald also suffered intangible, but nonetheless real, prejudice as outlined by the Court in *Klopfer* and *Barker.*

He has had to live now for more than seven and one-half years with "anxiety and concern" of this unresolved prosecution, *Barker, supra,* 407 U.S. at 532, and with the public scorn, *Klopfer, supra,* 386 U.S. at 222, and obloquy, *Marion, supra,* 404 U.S. at 320 because during this extraordinary delay he has remained, in the government's view, the only suspect in the murders of his wife and children.

The extent of anxiety and concern felt by an accused is a function of the seriousness of the charges. It is difficult to conceive of any accused being under greater stress than one charged with first-degree murder, unless it is a defendant charged with the triple homicide of his own family.

The government, of course, recognized that its accusation against Dr. MacDonald in 1970 generated enormous anxiety and concern in him and his family. Government brief, at 50-51. Having triggered this effect, the government has maintained it by the continuing failure to bring the case to a conclusion until five years had elapsed.

Dr. MacDonald attempted to relieve his sense of constant oppression by urging a speedy resolution of the case. He repeatedly offered to make himself available for unlimited questioning in order to expedite the decision-making. The only response to

his call for resolution was government procrastination. The only response to his offers to be interrogated was government rejection.

While the Justice Department was ignoring Dr. MacDonald, others were not. The fact that the government unwaveringly pursued him as the murderer of his family was periodically made a matter of public awareness by newspaper stories appearing in New York, North Carolina and elsewhere.[50]

Dr. MacDonald was born and raised in the New York area, and served his internship there immediately before entering the Army. He returned to New York after his honorable discharge in 1970, but concluded that because of the persistent interest of the media in the pending accusation against him, the only way to rebuild his life was to move to California. There, he thought, less likelihood existed of having to regularly confront public awareness of the murder accusations. Ultimately the anonymity he sought in California was also stripped from him by local newspaper accounts of the continuing accusation against him.[51]

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50. Two examples of this are news stories that appeared in the *Raleigh* [N.C.] *News and Observer* at a time when there was no specific news event occurring.

A front-page story appeared on January 31, 1973 detailing the military proceedings and the on-going accusation against Dr. MacDonald which was expected to lead to an indictment. The article quoted an informant as saying that the Department of Justice "know(s)" Dr. MacDonald "did it." And, it also reported that Dr. MacDonald had moved to Long Beach, California.

A second story, essentially similar in content, appeared February 1, 1973.

A third example is the article which appeared in the *New York Daily News,* March 16, 1973, p. 3, under the headline "Eye Murder Case of Ex-Army Doc."

Even the present case before this Court caused a California newspaper to headline "Manson-Style Killings—Did the Doctor Do It?" followed by a sub-head that read "His wife and daughters were stabbed and his story is full of holes." *San Francisco Examiner and Chronicle,* October 23, 1977, section A, p. 7. The story was based on the brief that was filed by the government in this Court.

51. Transcript of bail hearing, January 29-30, 1975, at 55-56, 71.

The record offers moving examples of the public opprobrium suffered by Dr. MacDonald because of the extraordinary delays by the government.[52]

It was apparent to the court below that by the criteria set forth in this Court's speedy trial cases, dealing with intangible as well as tangible prejudice to an accused, Dr. MacDonald has suffered prejudice from the unwarranted delay in bringing his case to trial. This factor is properly weighed against the government.

CONCLUSION

For all of the foregoing reasons, the respondent, Dr. Jeffrey R. MacDonald, respectfully submits that the judgment of the court of appeals be affirmed.

Respectfully submitted,

BERNARD L. SEGAL
MICHAEL J. MALLEY
Attorneys for Respondent

KENNETH A. LETZLER
Of Counsel

November 1977

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52. A witness in the bail reduction hearing testified of his apprehensiveness about accompanying Dr. MacDonald on a group trip because he had read about the murders of the family and the accusation against him. Transcript of bail hearing, January 29-30, 1975, at 63.

ACKNOWLEDGMENTS

Counsel for the Respondent wish to acknowledge with appreciation the assistance of lawyers and law clerks who have contributed to the present work in this case: Sara A. Simmons, Lucy B. Robins and Jennifer B. Beaver. Gratitude is also expressd to the principal secretary, Helene Krieger; and to Gary M. Reing for editorial assistance.

Appendix A

No. 75-1892

In the Supreme Court of the United States

October Term, 1977

United States of America, Petitioner

v.

Jeffrey R. MacDonald

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

STATE OF ARIZONA
County of Maricopa—ss.

AFFIDAVIT OF MICHAEL J. MALLEY

Michael J. Malley, 750 East Tuckey Lane, Phoenix, Arizona, 85014, having been duly sworn, deposes and says as follows:

I am an attorney admitted to practice in the courts of the State of Texas, the District of Columbia, the State of Arizona, and before this Court.

In 1970, I was an officer in the United States Army, qualified under the provisions of the Uniform Code of Military Justice to represent accused persons at courts martial. I was detailed by the Army to be one of Dr. Jeffrey R. MacDonald's military attorneys for the Article 32 investigation held during the summer of 1970 at Fort Bragg, North Carolina.

As part of my preparation for the Article 32 hearings, I had occasion to interview Miss Pamela Kalin, who was the next-door neighbor of Dr. MacDonald and his family at Fort Bragg. To the best of my recollection, the interview took place in mid to late

June, 1970, prior to the beginning of the Article 32 hearings. The interview was conducted in Miss Kalin's house, at my request, with Miss Kalin's mother present.

I informed Miss Kalin who I was and that I represented Dr. MacDonald. I told her that I would like to ask her questions about what, if anything, she knew about the night of the crimes. Miss Kalin and her mother both agreed that I could interview her on that subject. To the best of my recollection, I took notes of the interview, but I can no longer locate those notes. It is my belief that the notes were lost or destroyed over the years during the course of my various moves within the Army or afterwards.

During the course of my interview with Miss Kalin, I showed her photographs of four weapons which allegedly were used to commit the murders of Colette MacDonald, Kristen MacDonald, and Kimberly MacDonald. The photographs had been given to Dr. MacDonald's defense counsel by the Army prosecutors, and were represented to be photographs of weapons which the government would seek to show at the Article 32 hearing were the murder weapons. I have subsequently seen copies of the same photographs. These were represented to me by Brian Murtagh, a government attorney, to be photographs of weapons shown to the grand jury which indicted Dr. MacDonald, and were represented to that grand jury to be photographs of the alleged weapons.

The photographs which I showed Miss Kalin depicted an ice pick, two knives, and a club-like stick. I asked Miss Kalin specifically whether she was familiar with the MacDonald household. She said that she was because she had been a babysitter for the MacDonalds. I asked her if she had occasion ever to use any kitchen utensils at the MacDonald house, and she replied that she did. I then asked her if she recognized any of the weapons shown in the photographs. I showed her one photograph at a time,

and she replied that she recognized none of the weapons. Though she was aware that the MacDonald kitchen did contain knives, she said that she did not know if either of the photographed knives came from the MacDonald kitchen. She stated that she could not identify the photographs in any way as reminding her of any knife she may have seen in the MacDonald house.

I asked her if she recalled seeing an ice pick in the MacDonald house, and she replied that she could not recall seeing an ice pick on any occasion. She said that the photograph of the ice pick I showed her did not remind her of anything she had seen in the MacDonald house.

I showed her the photograph of the club-like stick, and again, she said that she did not recall ever seeing it in the MacDonald house.

I then asked her to recall for me what she remembered about the night of the murders. She said she didn't remember much, except that she "thought" (she reiterated that she was not sure) she heard the voice of a man sobbing in the room below hers (which she believed to be the MacDonald living room: her house was a duplex, with the upstairs bedroom she occupied being over the MacDonald living room). I asked her if she heard anything else and she replied that she did not until she was awakened by the noise of the military police arriving at the MacDonald house.

The interview lasted approximately an hour, much of which time I spent asking Miss Kalin about her knowledge of the MacDonald family relationship, which she characterized as a good and loving one. Miss Kalin's mother was present for the entire interview, and did not interrupt either me or Miss Kalin. The interview was conducted in a quiet and cordial atmosphere, and I recall going over, at least twice, many questions about the photographs and Miss Kalin's recollections of the night of the murders. I told her I wanted to be sure that she was not leaving

anything out or forgetting anything. At no time did either Miss Kalin or her mother object to my questioning her. Following the interview, I left the Kalin house, and I have seen Miss Kalin again only when she testified at the Article 32 investigation.

Following the oral argument in the Fourth Circuit in this case, and at the prodding of the panel hearing the argument, the government released to Dr. MacDonald's counsel (of whom I am still one), the transcript of Miss Kalin's 1974 grand jury testimony. I have examined that transcript with respect to the matters described above in this affidavit, and I find it to be substantially at odds with the story she told me in June, 1970, prior to the Article 32 hearing.

MICHAEL J. MALLEY
Michael J. Malley

STATE OF ARIZONA
County of Maricopa—ss.

On this the 10th day of October, 1977, before me, the undersigned officer, personally appeared MICHAEL J. MALLEY, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged that he executed the same for the purposes therein contained.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

BEV KAHL
Notary Public

My Commission Expires:
February 10, 1980.

Appendix B

In the Supreme Court of the United States

October Term, 1977

United States of America, Petitioner

v.

Jeffrey R. MacDonald

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

STATE OF CALIFORNIA
County of Alameda—ss.

DECLARATION OF JOHN I. THORNTON

I, JOHN I. THORNTON, am an associate professor of forensic science at the University of California at Berkeley. For the past seven years, I have been engaged in teaching and research in physical evidence. Previously, I had worked as a criminalist and laboratory director in the Contra Costa County crime laboratory, Martinez, California, for a period of nine years. I hold bachelor, master and doctorate degrees in forensic science from the University of California at Berkeley. I am the editor of a standard text book in physical evidence, and have authored approximately 65 journal articles describing the research in various areas of physical evidence. I am a Fellow of the American Academy of Forensic Science, and a past president of the California Association of Criminalists. I have testified as an expert witness in state and federal courts on numerous aspects of physical evidence.

I have been asked by defense counsel for Dr. Jeffrey R. MacDonald for my opinion regarding the feasibility of a reexamination of certain items of physical evidence on behalf of the defense, and the feasibility of a de novo examination of certain items of physical evidence which were collected at the scene but not examined by the prosecution's experts. In particular, I have been asked about the feasibility of such examination after

January 24, 1975, and also as of the present time, November 1977. I consider my opinion in this matter, as outlined below, to be equally as applicable to the situation as of January 1975, as it is now.

I have read and considered all of the reports of the Army CID laboratory, the FBI laboratory and the Bureau of Alcohol, Tobacco and Firearms laboratory concerning the analysis, identification and interpretation of the physical evidence in this case, which have been made available to the defense.

It is my opinion that the protracted delay from the time of collection of this evidence until January 1975, imposes severe constraints on the selection and execution of tests that may be applied to various aspects of the physical evidence in this case, and that the physical evidence is not capable in all regards of being utilized by the defense.

It would be virtually impossible at this time to obtain exemplar samples of some materials, for instance candle wax that is contemporaneous in a compositional sense with materials at the time the event occurred. Should the defense seek to introduce results of the analysis of some aspects of the physical evidence, it may immediately suffer the criticism that its exemplar samples are not truly representative.

Although the ABO blood types should, given proper storage, be recoverable at this time, it is virtually certain that attempts to develop other information from the blood stains would have been futile by January 1975, and certainly no less so now. In particular, the serum types and isoenzyme types, which are exceedingly useful genetic markers and provide considerable discrimination among individuals, cannot be determined by virtue of their deterioration with time. The availability of such test results could be of value in assisting the defense.

The foregoing declaration is made under penalty of perjury.

JOHN I. THORNTON
John I. Thornton

Appendix C

In the United States District Court
Eastern District of North Carolina
Raleigh District

GRAND JURY INVESTIGATION
IN THE MATTER OF:

THE DEATHS OF
COLETTE MACDONALD,
KIMBERLY MACDONALD, and
KRISTEN MACDONALD

APPEARING:

For the United States Government:

Victor Woerheide, Department of Justice
James T. Stroud, Asst. U. S. Attorney

WITNESS: PAMELA KALIN

At Raleigh
August 27, 1974

[11] Q. All right. What time would you say that was?
A. Between——I think about eleven o'clock.
Q. About eleven?
A. [Nod affirmatively]
Q. You were in bed at the time just before going to sleep.
A. [Nod affirmatively]
Q. Is that right?
A. Right.
Q. Did you hear any other noises prior to going to sleep?
A. No.
Q. Did you sleep through the night or were you awaken by something?
A. I awoke. At first by an angry voice.

Q. Male or female?

A. Male.

Q. Did you recognize the voice?

A. I thought who else could be down there but Jeff. That's all I thought.

Q. So you assumed that it was Jeff's voice?

A. Right.

Q. Can you say about what time this was?

A. No. I can't.

Q. Do you have any idea how long——were you in a deep [12] sleep at that point?

A. Yes.

Q. What about the voice do you remember, other than it was loud——what did you say? Loud, angry voice?

A. It was angry and cruel I think.

Q. And it was loud I assume since it awakened you.

A. There were tones. There were higher tones, angry tones than——you could tell that it was an angry conversation because there were higher tones.

Q. You mean higher in volume.

A. [Nod negatively]

Q. Or pitch?

A. In volume.

Q. Did you hear more than one voice at that time?

A. I don't remember.

Q. You say one was higher? Was it higher in relation to what else?

A. Maybe another voice. I don't remember.

Q. I believe when you and I discussed it prior you said that you felt like either before or after you heard that voice there was some lower tone like another voice. Is that right?

A. I don't know.

Q. But you're not real sure?

* * * * *

[22] A. No.

Q. Did you have occasion to be in the kitchen and in the utility room on several occasions?

A. Yes.

Q. Did you ever see any type of weapons in the house?

A. No.

Q. Now directing your attention to this club that's already been admitted, marked as an exhibit, is there anything about this club that rings a bell with you or that is familiar? This piece of wood.

A. Just the splattered paint, but not the piece of wood.

Q. The paint somehow rings a bell with you?

A. [Nod affirmatively]

Q. The color or the pattern of the paint? Or what?

A. The pattern.

Q. But the piece of wood itself does not?

A. No.

Q. Now referring you to the knife and—that is attached—the knife that is in a plastic bag that is attached to the ice pick that is in a plastic bag. The knife which has on it the prining "Stainless—Geneva Forge, USA." Do you recognize that knife?

A. No.

Q. Is there anything about it that is familiar to you?

A. I believe that my family had a color—one the same [23] color in a small one like that, but not the end shape and not the bent blade, but the color and the size of it.

Q. Do you have any recollection as to a knife like this in the MacDonald residence?

A. No.

Q. Did you ever do any dishes, wash dishes in the MacDonald residence?

A. Yes.

Q. On how many occasions if you can recall?

A. Three or four.

Q. This would be—what? Dishes left over from supper?

A. Right.

Q. Now, how about the ice pick? Do you recognize it?

A. No.

Q. Did the MacDonalds have an ice pick in their residence?

A. I think so.

Q. You think so.

A. [Nod affirmatively]

Q. Do you have any recollection as to where it was kept?

A. No.

Q. Do you have any recollection as to whether or not there was a drawer in the kitchen that was specifically for knives and kitchen utensils as opposed to silverware? Like in our house, for example, we've got one [24] drawer where we keep our silverware, like stainless steel eating utensils and then in another drawer we keep knives, like butcher knives or paring knives, and egg beater and this type stuff. What about in the MacDonald residence? Do you have a recollection to that?

A. No.

Q. Now referring you to the other knife which has imprinted on it and the handle, the wooden handle, "Old Hickory". Can you recognize that knife?

A. I think.

Q. You think?

A. [Nod affirmatively]

Q. What is there about this knife that you recognize?

A. The lettering.

Q. The "Old Hickory"?

A. [Nod affirmatively]

Q. On the handle?

A. [Nod affirmatively]

Q. Is there anything else about this as far as the coloring, the size, the shape?

A. The color.

Q. How about just the shape and design of it? Does that in any way ring a bell with you?

A. No.

[25] Q. All right. From where do you recognize it?

A. I'm not sure if it was a—I baby-sat a lot there and I don't know if I saw it at a baby-sitting house or friend's house or—I don't remember.

Q. Can you in any way connect it with the MacDonald residence?

A. I thought they had one with handles on their knives, but I don't remember.

Q. When you and I were talking yesterday, I believe, at least you gave me the impression that you did recognize it and that you felt like you recognized it from the MacDonald household. Is that not your recollection or is it?

A. I'm not sure.

Q. You're not sure?

A. [Nod negatively]

Q. Would it have been from your house? Did you have a knife like that?

A. No.

Q. How many places did you baby-sit?

A. About ten different places

Q. And you can't be more specific about where you would recognize them from?

A. No.

* * * * *

[36] FURTHER EXAMINATION BY MR. STROUD:

Q. Okay. I would like to remind you, Miss Kalin, that you are still under the oath that you took earlier in the day to tell the truth. Okay.

A. Right.

Q. Now after you were here earlier in the day and I questioned you, at my request, Mr. Murtagh, who is working with us,

went through some photographs of the house with you to see if this would bring back anything to you, recharge your memory in any way. Is that right?

A. Right.

Q. Now, also with reference to some other questions that I have of you, I believe you stated to me yesterday, that you really hadn't thought of this matter, the incident, the circumstances surrounding it with regard to the death of the wife and two children in the MacDonald family. You haven't really given it much thought since the occurrence four years ago. Is that right?

A. No. I've kept it out of my mind.

Q. Now since—and I've talked with you a good while yesterday and again this morning. As we were going through this and as I was asking you questions, did you find things coming back to your memory?

[37] A. Yes.

Q. That previously you had not thought of?

A. Yes.

Q. Now it is my understanding at this point that you have some further recollection which came to you today with regard to the ice pick which I earlier asked you about in the day. Is that right?

A. Right.

Q. Would you go ahead and state for the Grand Jury what that recollection is, please?

A. I remember using the ice pick that was on top of the refrigerator to get popsicles and ice cream out of the freezer which was always very full and I needed to break the ice away in order to get the popsicles out or whatever.

Q. Is there anything in particular that jogged your memory about that, about the popsicles and the ice pick?

A. Just—No. I was just relaxed after being here, and all of a sudden I just remembered it. I thought I recognized the ice pick, but it never really occurred to me.

Q. All right. Were you tense when you were before the Grand Jury earlier?

A. Yes.

Q. Are you tense now?

[38] A. No.

Q. So you say during a period of relaxation after being before the Grand Jury it came back to you? This recollection?

A. Right.

Q. Have there been any other recollections that came back to you.

A. No.

Q. Now showing you this ice pick now, I believe earlier in the day you said that you thought, as I recall your testimony, you thought that they had an ice pick in the house. Right?

A. Right.

Q. Right now you are sure they had an ice pick in the house and that the ice pick was kept on top of their refrigerator? Is that right?

A. Yes.

Q. Can you recall actually using the ice pick to get something out of the freezer?

A. Yes.

Q. On how many occasions?

A. Twice that I remember. I don't know other than that.

Q. And you are sure that this was in connection with the MacDonald residence?

A. Yes.

[39] Q. Now do you have any further recollection about being able to identify this particular ice pick?

A. The color.

Q. The color?

A. The light color of it.

Q. All right, now. So I take it you cannot say that this was the ice pick, but was it an ice pick like this one? In color, shape, and design?

A. Yes.

Q. That was in the house?

A. [Nod affirmatively]

Q. Now has anybody put that thought in your mind or is it something that you came to on your own?

A. I came to on my own.

Q. Now, did you see the ice pick in the house, anywhere other than on top of the refrigerator?

A. Not that I can remember, no

Q. But that's where it was normally kept? Is that a proper understanding?

A. Right.

Q. Now, can you recall——you talk about other places that you baby-sat at, can you recall there being an ice pick at any of those places?

A. No.

Q. Can you recall that there was not that you were aware [40] an ice pick at any of those places?

A. I never found any if there were.

Q. How about in your own house? Did you have an ice pick there?

A. Yes.

Q. What type was it in relation to this type?

A. It was an old one and it was painted. They painted it. It was bought painted and the paint was all chipped off. And it was a dark color. Gray and black, or something.

Q. I believe earlier that you told me that it also had a ring on the end of it.

A. Yes.

Q. And the handle where you could hang it on something.

A. Right.

Q. Where did you keep the ice pick in your home?

A. Where you put the ice cubes, where you open the freezer door inside the freezer.

Q. Did you ever see this ice pick used by anyone else in the MacDonald household?

A. No.

Q. Or one that looked like this one.

A. No.

Q. All right. I have one other question with regard to the rocking chair in the living room in relation